

24 MAY 2024

ORDER

**APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT
OF THE CRIME OF GENOCIDE IN THE GAZA STRIP**

(SOUTH AFRICA *v.* ISRAEL)

**APPLICATION DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION
DU CRIME DE GÉNOCIDE DANS LA BANDE DE GAZA**

(AFRIQUE DU SUD *c.* ISRAËL)

24 MAI 2024

ORDONNANCE

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INTERNATIONAL COURT OF JUSTICE

YEAR 2024

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**APPLICATION OF THE CONVENTION ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP**

(SOUTH AFRICA *v.* ISRAEL)

REQUEST FOR THE MODIFICATION OF THE ORDER OF 28 MARCH 2024

ORDER

Present: President SALAM; Vice-President SEBUTINDE; Judges ABRAHAM, YUSUF, XUE, BHANDARI, IWASAWA, NOLTE, CHARLESWORTH, BRANT, GÓMEZ ROBLEDO, CLEVELAND, AURESCU, TLADI; Judge ad hoc BARAK; Registrar GAUTIER.

The International Court of Justice,

Composed as above,

After deliberation,

Having regard to Article 41 of the Statute of the Court and Article 76 of the Rules of Court,

Makes the following Order:

1. On 29 December 2023, the Republic of South Africa (hereinafter “South Africa”) filed in the Registry of the Court an Application instituting proceedings against the State of Israel (hereinafter “Israel”) concerning alleged violations in the Gaza Strip of obligations under the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention” or the “Convention”).

2. In its Application, South Africa seeks to found the Court’s jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

3. The Application contained a Request for the indication of provisional measures submitted with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. Since at the time of the filing of the Application the Court included upon the Bench no judge of the nationality of either of the Parties, each Party availed itself of its right under Article 31 of the Statute to choose a judge *ad hoc* to sit in the case. South Africa chose Mr Dikgang Ernest Moseneke and Israel chose Mr Aharon Barak.

5. After hearing the Parties, the Court, by an Order of 26 January 2024, indicated the following provisional measures:

“(1) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:

- (a) killing members of the group;
- (b) causing serious bodily or mental harm to members of the group;
- (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
- (d) imposing measures intended to prevent births within the group;

(2) The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;

(3) The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;

(4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;

(5) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;

(6) The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.”

6. Following the election to the Court, with effect from 6 February 2024, of Judge Dire Tladi, a South African national, Mr Mosenke ceased to sit as judge *ad hoc* in the case, in accordance with Article 35, paragraph 6, of the Rules of Court.

7. By a letter dated 12 February 2024, South Africa, referring to “the developing circumstances in Rafah”, called upon the Court urgently to exercise its power under Article 75, paragraph 1, of the Rules of Court. By a letter dated 15 February 2024, Israel provided its observations on South Africa’s communication.

8. By letters dated 16 February 2024, the Registrar informed the Parties of the following decision of the Court in response to South Africa’s communication:

“The Court notes that the most recent developments in the Gaza Strip, and in Rafah in particular, ‘would exponentially increase what is already a humanitarian nightmare with untold regional consequences’, as stated by the United Nations Secretary-General (Remarks to the General Assembly on priorities for 2024 (7 Feb. 2024)).

This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures.

The Court emphasizes that the State of Israel remains bound to fully comply with its obligations under the Genocide Convention and with the said Order, including by ensuring the safety and security of the Palestinians in the Gaza Strip.”

9. On 26 February 2024, Israel submitted, within the time-limit fixed for that purpose, a report on all measures taken to give effect to the Court’s Order on the indication of provisional measures of 26 January 2024, pursuant to paragraph 86, subparagraph 6, thereof. South Africa duly presented its observations on that report.

10. On 6 March 2024, South Africa requested the Court “to indicate further provisional measures and/or to modify its provisional measures indicated on 26 January 2024”, with reference to Article 41 of the Statute of the Court, as well as Articles 75, paragraphs 1 and 3, and 76 of the Rules of Court. On 15 March 2024, Israel provided its written observations on that Request.

11. By an Order of 28 March 2024, the Court reaffirmed the provisional measures indicated in its Order of 26 January 2024 and indicated the following provisional measures:

“The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by Palestinians in Gaza, in particular the spread of famine and starvation:

- (a) Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary;
- (b) Ensure with immediate effect that its military does not commit acts which constitute a violation of any of the rights of the Palestinians in Gaza as a protected group under the Convention on the Prevention and Punishment of the Crime of Genocide, including by preventing, through any action, the delivery of urgently needed humanitarian assistance".

The Court also directed Israel to submit a report to the Court on all measures taken to give effect to that Order, within one month as from the date thereof.

12. On 29 April 2024, Israel submitted, within the time-limit fixed for that purpose, a report on all measures taken to give effect to the Court's Order on the indication of provisional measures of 28 March 2024, pursuant to paragraph 51, subparagraph 3, thereof. South Africa duly presented its observations on that report.

13. On 10 May 2024, South Africa submitted to the Court an "urgent Request for the modification and indication of provisional measures" pursuant to Article 41 of the Statute and Articles 75 and 76 of the Rules of Court.

14. In its Request, South Africa asked the Court to indicate the following provisional measures:

- 1. The State of Israel shall immediately withdraw and cease its military offensive in the Rafah Governorate.
- 2. The State of Israel shall immediately take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies or officials, investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence, and shall ensure that its military does not act to prevent such access, provision, preservation or retention.
- 3. The State of Israel shall submit an open report to the Court: (a) on all measures taken to give effect to these provisional measures within one week as from the date of this Order; and (b) on all measures taken to give effect to all previous provisional measures indicated by the Court within one month as from the date of this Order."

15. The Registrar immediately communicated to the Government of Israel a copy of South Africa's Request, in accordance with Article 73, paragraph 2, of the Rules of Court. In a separate communication on the same day, Israel was invited to present written observations on that Request by 15 May 2024. By letters dated 13 May 2024, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 16 and 17 May 2024 as the dates for the oral proceedings on the Request. By a letter also dated 13 May 2024, Israel asked the Court to postpone the hearings to the following week. After having ascertained the views of the Applicant, which opposed this request, the Court, in light of the circumstances, decided not to postpone the hearings. The Parties were informed of the Court's decision by letters dated 14 May 2024.

16. At the public hearings held on 16 and 17 May 2024, oral observations on the Request were presented by:

On behalf of South Africa: HE Mr Vusimuzi Madonsela,
Mr Vaughan Lowe,
Mr John Dugard,
Mr Max du Plessis,
Ms Adila Hassim,
Mr Tembeka Ngcukaitobi,
Ms Blinne Ní Ghrálaigh.

On behalf of Israel: Mr Gilad Noam,
Ms Tamar Kaplan Tourgeman.

17. At the end of its oral observations, South Africa asked the Court to indicate the following provisional measures:

“South Africa respectfully requests the Court to order the State of Israel, as a State party to the Genocide Convention and as a [P]arty to these proceedings, to:

- (1) *immediately, and further to its obligations under the Court's previous Orders of 26 January 2024 and 28 March 2024, cease its military operations in the Gaza Strip, including in the Rafah Governorate, and withdraw from the Rafah Crossing and immediately, totally and unconditionally withdraw the Israeli army from the entirety of the Gaza Strip;*
- (2) *immediately, and further to its obligations under provisional measure 4 of the Court's 26 January 2024 Order and provisional measures 2 (a) and 2 (b) of the Court's 28 March 2024 Order, take all effective measures to ensure and facilitate the unimpeded access to Gaza of United Nations and other officials engaged in the provision of humanitarian aid and assistance to the population of Gaza, as well as fact-finding missions, internationally mandated bodies and/or officials,*

investigators, and journalists, in order to assess and record conditions on the ground in Gaza and enable the effective preservation and retention of evidence; and ensure that its military does not act to prevent such access, provision, preservation or retention;

(3) submit an open report to the Court (a) on all measures taken to give effect to these provisional measures within one week as from the date of this Order; and (b) on all measures taken to give effect to all previous provisional measures indicated by the Court within one month as from the date of this Order.”

18. At the end of its oral observations, Israel requested the Court to “reject the request for the modification and indication of provisional measures submitted by the Republic of South Africa”.

19. At the end of the hearings, a Member of the Court put a question to Israel, which provided a written reply to the question on 18 May 2024. South Africa submitted written comments on the reply provided by Israel on 20 May 2024.

*

* * *

I. GENERAL OBSERVATIONS

20. In the view of the Court, South Africa’s present Request is a request for the modification of the Order of 28 March 2024. For this reason, the Court must determine whether the conditions set forth in Article 76, paragraph 1, of the Rules of Court have been fulfilled. That paragraph reads as follows:

“At the request of a party or *proprio motu*, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification.”

21. The Court must first ascertain whether, taking account of the information that the Parties have provided with respect to the current situation, there is reason to conclude that the situation that warranted the decision set out in its Order of 28 March 2024 has changed since that time. If the Court finds that there was a change in the situation since the delivery of its earlier Order, it will then have to consider whether such a change justifies a modification of its earlier decision concerning provisional measures. Any such modification would be appropriate only if the general conditions laid down in Article 41 of the Statute of the Court were also met in this instance (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order of 12 October 2022, I.C.J. Reports 2022 (II), p. 581, para. 12*).

22. The Court will thus begin by determining whether there has been a change in the situation that warranted the decision set out in its Order of 28 March 2024.

* * *

23. South Africa states that its present Request is prompted by the ground incursion that Israel's military began on 7 May 2024 in Rafah, the "last refuge" in Gaza for 1.5 million Palestinians, the majority of whom had been forcibly displaced from northern and central Gaza, and the last viable centre in Gaza for habitation, public administration, and the provision of basic public services and medical care. South Africa contends that Israel has now seized control of both the Rafah crossing and the Kerem Shalom (Karem Abu Salem) crossing, thereby taking full and direct control over all entry and exit points for people and goods to and from Gaza, and that it has closed the former crossing and "mostly disabled" the latter. It alleges that medical facilities in Rafah are also in danger, as the main facility in the entire Rafah Governorate is no longer operational, while the functioning of others is severely impacted. South Africa argues that Israel has directed Palestinians in the eastern portion of Rafah to relocate to "the so-called Al-Mawasi 'humanitarian area' in the Khan Younis Governorate", which is allegedly already overcrowded and lacking in safety, as well as in essential services. According to South Africa, a mass evacuation on this scale is "impossible to carry out safely". The Applicant adds that, in any event, "there is nowhere for Palestinians in Rafah to go", as approximately 76 per cent of the territory of Gaza is now under evacuation orders, and "an estimated two thirds of homes have been damaged or destroyed".

24. In the Applicant's view, Israel's military incursion into Rafah, in light of the extreme risk it poses to humanitarian supplies and basic services in Gaza, to the Palestinian medical system and to the survival of Palestinians in Gaza as a group, "is not only an escalation of the prevailing situation, but gives rise to new facts that are causing irreparable harm to the rights of the Palestinian people in Gaza". South Africa argues that "[t]his amounts to a change in the situation in Gaza since the Court's Order of 28 March 2024, within the meaning of Articles 75 (3) and 76 (2) of the Rules of the Court".

*

25. Israel rejects South Africa's contention that there has been a change in the situation since the Court's Order of 28 March 2024. It claims that, "[w]hile many civilians have indeed evacuated to Rafah over the past few months, the fact remains that the city of Rafah also serves as a military stronghold for Hamas, which continues to pose a significant threat to the State of Israel and its citizens". Israel refutes South Africa's allegations that it has closed critical border crossings in Gaza, or that it has failed to facilitate the provision of fuel for sustaining humanitarian operations and facilities. Israel emphasizes that, on the contrary, it has made continuous efforts to alleviate the humanitarian situation in the Gaza Strip, including by opening a new land crossing at Erez West on 12 May 2024, by facilitating the establishment of a floating pier off the Gaza coast, which became operational on 17 May 2024, and by supporting the "rehabilitation of hospitals" in and outside Rafah.

26. Israel contends that it “continues to take extraordinary measures in order to minimize harm to Palestinian civilians in Gaza”, in particular by informing civilians of planned operations by the Israeli Defense Forces in specific areas, by putting in place clear and definite targeting procedures so as to achieve the requisite military needs while minimizing civilian harm, by taking additional measures to ensure that the Israeli Defense Forces are aware of sensitive sites, such as medical services and shelters, and by ensuring that humanitarian aid continues to be delivered during the course of hostilities.

* * *

27. The Court recalls that, in its Order of 26 January 2024, it noted that the military operation conducted by Israel following the attack of 7 October 2023 had resulted in “a large number of deaths and injuries, as well as the massive destruction of homes, the forcible displacement of the vast majority of the population, and extensive damage to civilian infrastructure” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024*, para. 46). In its decision communicated to the Parties by letters of 16 February 2024, the Court noted, quoting the United Nations Secretary-General, that the developments in the Gaza Strip, and in Rafah in particular, “would exponentially increase what [wa]s already a humanitarian nightmare with untold regional consequences” (see paragraph 8 above). The Court further recalls that, in its Order of 28 March 2024, it observed with regret that the catastrophic living conditions of the Palestinians in the Gaza Strip had deteriorated further since January 2024, especially in view of the prolonged and widespread deprivation of food and other basic necessities to which the Palestinians in the Gaza Strip had been subjected (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 18).

28. The Court notes that the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated, and has done so even further since the Court adopted its Order of 28 March 2024. In this regard, the Court observes that the concerns that it expressed in its decision communicated to the Parties on 16 February 2024 with respect to the developments in Rafah have materialized, and that the humanitarian situation is now to be characterized as disastrous. After weeks of intensification of military bombardments of Rafah, where more than a million Palestinians had fled as a result of Israeli evacuation orders covering more than three quarters of Gaza’s entire territory, on 6 May 2024, nearly 100,000 Palestinians were ordered by Israel to evacuate the eastern portion of Rafah and relocate to the Al-Mawasi and Khan Younis areas ahead of a planned military offensive. The military ground offensive in Rafah, which Israel started on 7 May 2024, is still ongoing and has led to new evacuation orders. As a result, according to United Nations reports, nearly 800,000 people have been displaced from Rafah as at 18 May 2024.

29. The Court considers that the above-mentioned developments, which are exceptionally grave, in particular the military offensive in Rafah and the resulting repeated large-scale displacement of the already extremely vulnerable Palestinian population in the Gaza Strip, constitute a change in the situation within the meaning of Article 76 of the Rules of Court.

30. The Court is also of the view that the provisional measures indicated in its Order of 28 March 2024, as well as those reaffirmed therein, do not fully address the consequences arising from the change in the situation explained above, thus justifying the modification of these measures. However, in order to modify its earlier decision concerning provisional measures, the Court must still satisfy itself that the general conditions laid down in Article 41 of the Statute of the Court are met in the current situation.

II. CONDITIONS FOR THE INDICATION OF PROVISIONAL MEASURES

31. The Court recalls that, in its Order of 26 January 2024 indicating provisional measures in the present case, it concluded that “*prima facie, it ha[d] jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case*” (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024*, para. 31). In its Order of 28 March 2024 concerning South Africa’s Request of 6 March 2024 for the modification of the Order of 26 January 2024, the Court stated that it saw no reason to revisit that conclusion (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 24). The Court likewise sees no reason to do so for the purposes of deciding on the present Request.

32. In the Order of 26 January 2024, the Court also found that at least some of the rights claimed by South Africa under the Genocide Convention and for which it was seeking protection were plausible, namely the right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel’s compliance with the latter’s obligations under that Convention (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January 2024*, para. 54). The Court saw no reason to revisit this conclusion in its Order of 28 March 2024 (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 25). The Court likewise sees no reason to do so for the purposes of deciding on the present Request. It further considers that, by their very nature, at least some of the provisional measures sought pursuant to the present Request (see paragraph 17 above) are aimed at preserving the rights claimed by the Applicant that the Court has found to be plausible.

33. The Court must now consider whether the current situation entails a risk of irreparable prejudice to the plausible rights claimed by South Africa and whether there is urgency.

34. The Court recalls in this regard that it has previously concluded that, in view of the fundamental values sought to be protected by the Genocide Convention, the plausible rights in question in these proceedings are of such a nature that prejudice to them is capable of causing irreparable harm (see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 26 January*

2024, para. 66; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Request for the Modification of the Order of 26 January 2024 Indicating Provisional Measures, Order of 28 March 2024*, para. 27).

* * *

35. The Applicant states that the situation in Gaza “could not be more urgent” and therefore demands the indication of further or modified provisional measures. South Africa refers, in particular, to the widespread risk of violent death and injury faced by the displaced Palestinian population, as well as to the increased restrictions on the provision of humanitarian assistance and the deprivation of access to healthcare that will ensue if hospitals in Rafah are rendered inoperable.

36. The Applicant contends that there has already been “a total collapse of infrastructure, of sanitation, of water, of food supply: in short, the conditions necessary to sustain life for the 2.3 million Palestinians in Gaza”. According to South Africa, “[t]he level of destruction that Israel has caused across Gaza and is now wreaking on Rafah threatens the very survival of future Palestinian generations in Gaza”.

37. South Africa further contends that the very manner in which Israel is pursuing its military operations in Rafah, as well as elsewhere in Gaza, is itself genocidal. Thus, according to South Africa, an “explicit order that Israel ‘cease its military activities’” is required to “protect what is left of Palestinian life in Gaza”. South Africa emphasizes that there are no evacuation zones in Gaza where humanitarian aid and assistance are provided. It contends, in particular, that Al-Mawasi cannot be considered as a humanitarian zone for Palestinians instructed to evacuate from Rafah because it is

“profoundly unsafe: over-crowding, mountains of waste, and the lack of water and sanitation are leading to the spread of disease, while Israeli military attacks on the area, including aerial bombardment, shelling and sniping, have led to and continue to lead to serious injury and death”.

According to South Africa, Israel “had no plan in place to accommodate the hundreds of thousands of Palestinians ordered to flee Rafah and other areas in early May 2024 — just like it had no plan to accommodate those forced to flee as a result of previous evacuation orders”.

38. The Applicant finally states that Israel’s “complete refusal to allow independent investigators” in Gaza entails a risk that the true number of Palestinian casualties will remain unknown and that evidence will be obliterated as a result of Israel’s ongoing military operation. In South Africa’s view, this justifies the imposition of a measure requiring Israel to grant unimpeded access to Gaza to “persons able to investigate ongoing atrocities”, particularly in light of the recent

discovery of multiple mass graves at Nasser Hospital in Khan Younis and at Al Shifa Hospital in Gaza City with bodies “reportedly showing signs of torture and summary executions”.

*

39. Israel maintains that the allegations against it are “patently untrue” and that many of South Africa’s assertions lack any basis in fact or law. The Respondent argues that the provisional measures indicated by the Court that are currently in place are entirely sufficient and claims that South Africa has not established that the “extreme measures” that it now seeks are justified.

40. Israel contends that there has not been “a large-scale assault” on Rafah, but rather that specific, limited and localized operations have been undertaken, prefaced by incremental and localized evacuations and support for humanitarian activities. It states that, as part of its efforts to facilitate the evacuation of civilians from parts of the Rafah region where intense hostilities were expected, “a humanitarian area was initially delineated by Israel in the Al-Mawasi area” located outside the theatre of planned hostilities. Israel states that this area was “expanded very significantly” since the beginning of the military offensive.

41. According to the Respondent, the Israeli Defense Forces implement “[r]estricted fire areas” and “tactical pauses in fighting along evacuation routes” to enhance the security of the Palestinians evacuating. Israel further states that two main routes can reach this “humanitarian area”, making it possible to deliver aid, including from the floating pier off the Gaza coast operational since 17 May 2024. It also alleges that it actively facilitates the provision of food, water and shelter, and that six of the eight field hospitals in Gaza are located in that area. Israel submits that it has purchased 40,000 tents capable of sheltering 320,000 people in the humanitarian area and that 7,000 of those tents have entered Gaza. According to Israel’s assessment, approximately 800,000 civilians have evacuated the Rafah area to date, whether as a result of sectoral warnings issued by the Israeli Defense Forces or on their own initiative.

42. In Israel’s view, an Order by the Court requesting the cessation of hostilities by Israel “would mean that 132 hostages would remain to languish in Hamas’ tunnels forsaken . . . [and that] Hamas would be left unhindered and free to continue its attacks against Israeli territory and Israeli civilians”. Israel also states that its military action in Rafah has the purpose of protecting its civilians and rescuing the Israeli hostages still held by Hamas and other armed groups. The Respondent further states that it has in place the necessary mechanisms to examine and investigate allegations of wrongdoing by its military forces and to ensure accountability.

* * *

43. The Court recalls that, on 7 May 2024, Israel began a military offensive in Rafah, following weeks of intensified bombardment, and that, as a result, approximately 800,000 Palestinians were displaced from Rafah as at 18 May 2024 (see paragraph 28 above).

44. The Court notes that senior United Nations officials have consistently underscored the immense risks associated with a military offensive in Rafah. For instance, on 3 May 2024, the Spokesperson of the Office for the Coordination of Humanitarian Affairs (OCHA) warned that an assault on Rafah would put “hundreds of thousands of people . . . at imminent risk of death” and would severely impact the humanitarian operation in the entire Gaza Strip, which is run primarily out of Rafah (OCHA, “Hostilities in the Gaza Strip and Israel — Flash Update #162”, 6 May 2024). On 6 May 2024, the United Nations Children’s Fund (UNICEF) indicated that about half of the approximately 1.2 million Palestinians sheltering in Rafah were children, and warned that military operations therein would result in “the few remaining basic services and infrastructure they need to survive being totally destroyed” (UNICEF, “UNICEF warns: There is ‘nowhere safe to go’ for the 600,000 children of Rafah”, press release, 6 May 2024).

45. United Nations sources indicate that the above-mentioned risks have started to materialize and will intensify even further if the operation continues. For instance, on 8 May 2024, the Director-General of the World Health Organization stated that the Al Najjar Hospital, one of the last remaining medical facilities in the Rafah Governorate, was no longer functional due to the ongoing hostilities in its vicinity. On 17 May 2024, the World Food Programme (WFP) warned that it had been unable to access its warehouse in Rafah for over a week and observed that “[t]he incursion into Rafah is a significant setback to recent modest progress on access” (WFP, “Gaza updates: WFP responds to hunger crisis as Rafah incursion cuts access to warehouse”, press release, 17 May 2024).

46. On the basis of the information before it, the Court is not convinced that the evacuation efforts and related measures that Israel affirms to have undertaken to enhance the security of civilians in the Gaza Strip, and in particular those recently displaced from the Rafah Governorate, are sufficient to alleviate the immense risk to which the Palestinian population is exposed as a result of the military offensive in Rafah. The Court observes, for instance, that according to a statement by the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), Mr Philippe Lazzarini, on 18 May 2024,

“[t]he areas that people are fleeing to now do not have safe water supplies or sanitation facilities. Al-Mawasi — as one example — is a sandy 14 square kilometre agricultural land, where people are left out in the open with little to no buildings or roads. It lacks the minimal conditions to provide emergency humanitarian assistance in a safe and dignified manner.”

The Court observes that Israel has not provided sufficient information concerning the safety of the population during the evacuation process, or the availability in the Al-Mawasi area of the necessary amount of water, sanitation, food, medicine and shelter for the 800,000 Palestinians that have evacuated thus far. Consequently, the Court is of the view that Israel has not sufficiently addressed and dispelled the concerns raised by its military offensive in Rafah.

47. In light of the considerations set out above, and taking account of the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, the Court finds that the current situation arising from Israel's military offensive in Rafah entails a further risk of irreparable prejudice to the plausible rights claimed by South Africa and that there is urgency, in the sense that there exists a real and imminent risk that such prejudice will be caused before the Court gives its final decision.

III. CONCLUSION AND MEASURES TO BE ADOPTED

48. The Court concludes, on the basis of the above considerations, that the circumstances of the case require it to modify its decision set out in its Order of 28 March 2024.

49. The Court recalls that, in accordance with Article 75, paragraph 2, of its Rules, when a request for the indication of provisional measures has been made, it has the power under its Statute to indicate measures that are, in whole or in part, other than those requested. In the present case, having considered the terms of the provisional measures requested by South Africa and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested.

50. The Court considers that, in conformity with its obligations under the Genocide Convention, Israel must immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part.

51. The Court recalls that, in its Order of 26 January 2024, it ordered Israel, *inter alia*, to "take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of [the Genocide Convention]" (see paragraph 5 above). In the present circumstances, the Court is also of the view that, in order to preserve evidence related to allegations of acts falling within the scope of Article II and Article III of the Genocide Convention, Israel must take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide.

52. The Court also considers that the catastrophic situation in Gaza confirms the need for the immediate and effective implementation of the measures indicated in its Orders of 26 January 2024 and 28 March 2024, which are applicable throughout the Gaza Strip, including in Rafah. In these circumstances, the Court finds it necessary to reaffirm the measures indicated in those Orders. In so doing, the Court wishes to emphasize that the measure indicated in paragraph 51 (2) (a) of its Order of 28 March 2024, requiring the "unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance", necessitates that the Respondent maintain open land crossing points, and in particular the Rafah crossing.

53. In view of the specific provisional measures it has decided to indicate, the Court considers that Israel must submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order. The report so provided will then be communicated to South Africa, which shall be given the opportunity to submit to the Court its comments thereon.

54. The Court recalls that its orders on provisional measures under Article 41 of the Statute have binding effect and thus create international legal obligations for any party to whom the provisional measures are addressed (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 22 February 2023, I.C.J. Reports 2023*, p. 29, para. 65).

55. The Court underlines that the present Order is without prejudice to any findings concerning the Respondent's compliance with the Orders of 26 January 2024 and 28 March 2024.

*

* * *

56. In its Orders of 26 January 2024 and 28 March 2024, the Court expressed its grave concern over the fate of the hostages abducted during the attack in Israel on 7 October 2023 and held since then by Hamas and other armed groups, and called for their immediate and unconditional release. The Court finds it deeply troubling that many of these hostages remain in captivity and reiterates its call for their immediate and unconditional release.

*

* * *

57. For these reasons,

THE COURT,

(1) By thirteen votes to two,

Reaffirms the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which should be immediately and effectively implemented;

IN FAVOUR: *President Salam; Judges Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;*

AGAINST: *Vice-President Sebutinde; Judge ad hoc Barak;*

(2) *Indicates* the following provisional measures:

The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate:

(a) By thirteen votes to two,

Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part;

IN FAVOUR: *President Salam; Judges Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;*

AGAINST: *Vice-President Sebutinde; Judge ad hoc Barak;*

(b) By thirteen votes to two,

Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance;

IN FAVOUR: *President Salam; Judges Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;*

AGAINST: *Vice-President Sebutinde; Judge ad hoc Barak;*

(c) By thirteen votes to two,

Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide;

IN FAVOUR: *President Salam; Judges Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;*

AGAINST: *Vice-President Sebutinde; Judge ad hoc Barak;*

(3) By thirteen votes to two,

Decides that the State of Israel shall submit a report to the Court on all measures taken to give effect to this Order, within one month as from the date of this Order.

IN FAVOUR: *President Salam; Judges Abraham, Yusuf, Xue, Bhandari, Iwasawa, Nolte, Charlesworth, Brant, Gómez Robledo, Cleveland, Aurescu, Tladi;*

AGAINST: *Vice-President Sebutinde; Judge ad hoc Barak.*

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fourth day of May, two thousand and twenty-four, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of South Africa and the Government of the State of Israel, respectively.

(Signed) Nawaf SALAM,
President.

(Signed) Philippe GAUTIER,
Registrar.

Vice-President SEBUTINDE appends a dissenting opinion to the Order of the Court; Judges NOLTE, AURESCU and TLADI append declarations to the Order of the Court; Judge *ad hoc* BARAK appends a dissenting opinion to the Order of the Court.

(Initialled) N.S.

(Initialled) Ph.G.

Communication
to the Office of the Prosecutor of the International Criminal Court

**Responsibility of the President of the European Commission
for aiding and abetting the commission of war crimes, crimes against humanity
and genocide by the Israeli military forces in the Gaza Strip**

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Executive Summary

1. A communication is submitted to the Office of the Prosecutor of the International Criminal Court (ICC), setting forth in detail, through facts and evidence, that there are reasonable grounds to believe that the current president of the European Commission, Mrs. Ursula von der Leyen, a national of Germany, is complicit in a number of violations of international humanitarian law, amounting to crimes within the jurisdiction of the ICC, committed by the Israeli armed forces (IDF) against Palestinian civilians in the Occupied Palestinian Territory (OPT), including the Gaza Strip.
2. This communication, made pursuant to Article 15 of the Rome Statute of the ICC, calls the Prosecutor to initiate investigations *proprio motu* on the basis of the information provided against Mrs. Ursula von der Leyen.
3. Mrs. Ursula von der Leyen shall be criminally responsible and liable for punishment for some of the war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, to the extent that she has aided, abetted and otherwise assisted in the commission or attempted commission of such crimes, including providing the means for its commission, in the meaning of Article 25(3)(c) of the Rome Statute of the ICC.
4. Mrs. Ursula von der Leyen has done so, through a range of positive acts as well as omissions, in her official capacity as president of the European Commission. Positive acts include the following:
 - **Military support** to Israel: Mrs. von der Leyen, in her official capacity as president of the European Commission, has been instrumental in securing the provision of means, under the form of military support, to the IDF. During the period 2019-23, Israel has been the 3rd main recipient of weapons provided by a EU Member State, Germany, itself the 5th largest exporter of major arms in the world (Germany's share in global arms exports is 5,6%). Israel received during that period 12% of Germany's total exports of military equipment.
 - **Economic and financial support** to Israel: both by refusing to take any steps toward the suspension of the EU-Israel Association Agreement

(despite the human rights clause in that instrument calling for such suspension in accordance with the EU policy on conditionality of international agreements), and by promoting, amidst the current Israeli assault on Gaza, new EU-Israel cooperation instruments.

- **Diplomatic support** to the Israeli government: this appears to be a response to the demand formulated by Prime Minister Netanyahu on 7 October 2023, on the international community “to ensure freedom of action for Israel in the continuation of the campaign”. The diplomatic support enjoyed by Israel has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October.
- **Political support:** the various official statements of Mrs. von der Leyen expressing unconditional support to Israel have amounted to (and could not reasonably be understood otherwise than) giving encouragement and moral support to members of the IDF, who were (and still are) involved in the commission of crimes against the Palestinian population in the OPT.

5. The President of the European Commission had knowledge of participating, by aiding and abetting, in the commission of the relevant crimes. Given the wide publicity given on a daily basis to the violations of international humanitarian law perpetrated by the IDF in the Gaza Strip, especially since October 2023, and the wealth of official United Nations reports and documents available, which as a matter of fact have prompted numerous UN officials - including the UN Secretary-General – to express their utmost concern, Mrs. von der Leyen cannot escape the simple fact that she knew of such crimes, or at the very least she knew of the plausibility of such crimes, as was found by the ICJ in its Order on provisional measures of 26 January 2024 as regards genocide. Even under the “plausibility” standard, she should have taken every possible action at her disposal to prevent the continued commission of such crimes, and at the very least not to facilitate in any manner the commission of these crimes, as she unfortunately did.
6. The President of the European Commission has also failed to act to prevent the commission of the relevant crimes. She is thus complicit by omission. Indeed:
 - President von der Leyen was, and still is, under a legal duty to act in the circumstances considered, to the extent that international law places upon a person vested with public authority a duty to act in order to protect human life.
 - President von der Leyen had, and still has, the ability to act; means were (and still are) available to her to fulfil her duty to act. This is confirmed by actions taken by the European Commission under her presidency, in other contexts, to prevent the commission of war crimes and curtail the ability of certain powers to conduct military operations (e.g. international

sanctions against the Russian Federation in the context of the conflict in Ukraine).

- Should President von der Leyen have acted pursuant to her legal duty to act, rather than sought to “ensure freedom of action for Israel in the continuation of the campaign”, the crimes would have been substantially less likely to occur, or at the very least to be perpetrated over such a long period of time, and on such a scale and magnitude.

Communication
to the Office of the Prosecutor of the International Criminal Court

**Responsibility of the President of the European Commission
for aiding and abetting the commission of war crimes, crimes against humanity
and genocide by the Israeli military forces in the Gaza Strip**

A. Introduction

1. The present communication is addressed to the Office of the Prosecutor (hereinafter “OTP”) of the International Criminal Court (hereinafter the “ICC” or the “Court”), pursuant to Article 15 of the Rome Statute of the ICC¹, according to which the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. The present communication provides such information regarding the case of the President of the European Commission, Mrs. Ursula von der Leyen.
2. It is demonstrated in the present communication, through facts and evidence, that there are reasonable grounds to believe that Mrs. Ursula von der Leyen is complicit in a number of violations of international humanitarian law, amounting to crimes within the jurisdiction of the Court, committed by the Israeli armed forces (officially named “Israeli Defence Forces” or “IDF”) against Palestinian civilians in the Occupied Palestinian Territory (hereinafter the “OPT”), including the Gaza Strip. Put otherwise, the present communication asserts that Mrs. Ursula von der Leyen shall be criminally responsible and liable for punishment for some of the war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, to the extent that she has aided, abetted and otherwise assisted in the commission or attempted commission of such crimes, including providing the means for its commission, in the meaning of Article 25(3)(c) of the Rome Statute of the ICC. The present communication also demonstrates that Mrs. Ursula von der Leyen has done so, through a range of positive acts as well as omissions, in her official capacity as president of the European Commission, in full knowledge of the

¹ Rome Statute adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, in force on 1 July 2002, *United Nations, Treaty Series*, vol. 2187, No. 38544.

fact that her actions and omissions would render substantial assistance to the perpetrators of the crimes concerned; so that she is to be deemed to have acted “for the purpose of facilitating the commission of such [] crime[s]”, for the purposes of Article 25(3)(c) of the Rome Statute.

3. The present communication is structured as follows. It first sets out briefly the jurisdiction of the ICC (**Section B**). It then provides a factual summary of the various acts, including statements of Mrs. Ursula von der Leyen, that may qualify as complicity by mode of aiding and abetting in crimes committed by the IDF against Palestinian civilians in the OTP, including the Gaza Strip, and provides the relevant factual background of these statements and actions, i.e. the genocidal statements of Israeli officials contemporary to these statements and actions, as recorded by a number of open sources, and identified as such by the ICJ,² and the contemporary records of violations of international humanitarian law committed by the IDF (**Section C**). It then briefly recalls the principles governing complicity by mode of aiding and abetting in the meaning of Article 25(3)(c) of the Rome Statute of the ICC, as clarified by the jurisprudence of international criminal courts and tribunals (**Section D**), before applying these principles to the facts summarised in Section B, i.e. the relevant statements, actions and omissions of Mrs. Ursula von der Leyen, demonstrating that the relevant statements and actions satisfy all accepted criteria for complicity by mode of aiding and abetting (**Section E**). The communication finally briefly addresses issues of complementarity (**Section F**) and gravity (**Section G**).

B. Jurisdiction

4. It is respectfully submitted that the OTP can be satisfied that the crimes referred to in this communication fall within the jurisdiction of the ICC. The following paragraphs establish that all relevant jurisdictional requirements are met.

5. With respect to jurisdiction *ratione materiae*, we refer to the allegations and legal analysis provided respectively in Section C (*Factual background*) and E (*Complicity by aiding and abetting in the context of support to Israeli actions*) below.

6. It is submitted that jurisdiction *ratione personae* also exists since the crimes described in the present communication have been committed by a national of a State Party to the Rome Statute, i.e. the Federal Republic of Germany.

7. As regards jurisdiction *ratione temporis*, the acts referred to in the present communication occurred since October 2023, i.e. after the entry into force of the Rome Statute both in general (1 July 2002) and in relation to Germany (1 July 2002) and Palestine (1 April 2015).

8. Finally, as regards jurisdiction *ratione loci*, it is submitted that the crimes described in the present communication have been committed both on the territory of States Parties to the Rome Statute, i.e. Belgium (where the European Commission has its seat and Mrs. von der Leyen exercises her functions) and Germany (of which Mrs. von der Leyen is a national), and in the specific case of complicity which forms the subject-matter of the present

² See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 26 January 2024 (Provisional measures), para. 52.

communication, that these acts (i.e. aiding and abetting the crimes of the principals) have occurred in relation to, and have facilitated the commission of, war crimes, crimes against humanity and genocide, perpetrated on the territory of another State Party to the Rome Statute, i.e. Palestine.

C. Factual background

9. The present communication intends to present selected statements and actions by European Commission President Ursula von der Leyen, that may qualify as complicity by mode of aiding and abetting in crimes committed by the IDF against Palestinian civilians in the OPT, including the Gaza Strip.

10. These statements and actions are reported in the present communication in a non-exhaustive manner, and focus on early statements, made during the days and weeks immediately following the attacks conducted by Palestinian militant groups on 7 October 2023 against various IDF sites and Israeli settlements. Thus, the present communication may need to be supplemented from time to time in light of ongoing actions by President Ursula von der Leyen and of the situation unfolding on the ground in the OPT.

11. As regards such war crimes, crimes against humanity and genocide having been committed (and still being committed) by the Israeli armed forces in the OPT, the authors of the present communication respectfully submit that there is no need to set out in detail nor even in brief the record of such crimes, since the OTP is aware of their existence, amply documented by the media and collected and presented by NGOs and most of all by various official reports of United Nations organs, bodies and agencies.³

12. Following the attacks conducted by Palestinian militant groups on 7 October 2023, as early as **11 October 2023**, European Commission President Ursula von der Leyen stated, with reference to the attacks of 7 October, that “there can only be one response to it. Europe stands with Israel. And we fully support Israel's right to defend itself”. She added: “I spoke with President Herzog and conveyed to him my full support”.⁴ On the same day (11 October 2023), she attended a ceremony “in solidarity with the victims of the terror attacks in Israel” at the European Parliament during which the President of the European Parliament Roberta Metsola referred to the 7 October attacks as “the worst terrorist attack in generations”. Addressing Israeli Ambassador Regev, Metsola stated: “We stand with you”.⁵

13. At the time when these early expressions of unconditional support for Israel were voiced, various genocidal statements had already been issued publicly by the highest Israeli

³ See e.g. Report of the United Nations High Commissioner for Human Rights, Human rights situation in the Occupied Palestinian Territory, including East Jerusalem, and the obligation to ensure accountability and justice (A/HRC/55/28), 4 March 2024.

⁴ European Commission, ‘[Statement by President von der Leyen](#) on the occasion of the minute of silence held by the College in honour of the victims of the terrorist attacks in Israel, in presence of the ambassador of Israel to the EU’, 11 October 2023.

⁵ European Parliament, [President Metsola in solidarity with the victims of the terror attacks in Israel](#), Press Release, 11 October 2023.

political and military leaders. For example, on 7 October 2023, in a televised address by the Government Press Office, Prime Minister Benjamin Netanyahu told the population of Gaza to “[l]eave now because we will operate forcefully everywhere”.⁶ On 9 October 2023, Defence Minister Yoav Gallant in an Israeli Army ‘situation update’ advised that Israel was “imposing a complete siege on Gaza. No electricity, no food, no water, no fuel. Everything is closed. We are fighting human animals and we are acting accordingly”.⁷ Gallant also informed troops on the Gaza border that he had “released all the restraints”,⁸ stating in terms that: “Gaza won’t return to what it was before. We will eliminate everything. If it doesn’t take one day, it will take a week. It will take weeks or even months, we will reach all places”.⁹ He further announced that Israel was moving to “a fullscale response” and that he had “removed every restriction” on Israeli forces.¹⁰ On 8 October 2023, the Israeli Minister of Finance Bezalel Smotrich stated at a meeting of the Israeli Cabinet that “[w]e need to deal a blow that hasn’t been seen in 50 years and take down Gaza”.¹¹

14. Notwithstanding these statements, speaking to Israeli Prime Minister Netanyahu during her visit in Israel on **13 and 14 October 2023**, European Commission President Ursula von der Leyen strongly expressed her unconditional support for Israel in plain terms. Referring to the 7 October attacks as an “unspeakable tragedy”, she stated that “there is only one possible response: Europe stands with Israel. And Israel has a right to defend itself. In fact, it has the duty to defend its people. And we must call by their name the atrocities committed by Hamas. This is terrorism. This is an act of war. Nothing can justify what Hamas did. This is the time to stand in solidarity with Israel and its people. And this is why I am here”. She added: “Let me also be very clear that Hamas alone is responsible for what is happening”. “I know that how Israel responds will show that it is a democracy”.¹²

⁶ “The IDF will immediately use all its strength to destroy Hamas's capabilities. We will destroy them and we will forcefully avenge this dark day that they have forced on the State of Israel and its citizens. As Bialik wrote: 'Revenge for the blood of a little child has yet been devised by Satan'. All of the places which Hamas is deployed, hiding and operating in, that wicked city, we will turn them into rubble. I say to the residents of Gaza: Leave now because we will operate forcefully everywhere. To our beloved IDF soldiers, police officers and security forces personnel, remember that you are the continuation of the heroes of the Jewish people, of Joshua, Judah Maccabee and the heroes of 1948 and of all of Israel's wars. You are now fighting for the home and future of us all. We are all with you. We all love you. We all salute you. Today, I spoke with US President Biden and with other world leaders in order to ensure freedom of action for Israel in the continuation of the campaign. I thank President Biden for his strong and clear words. I thank the President of France, the Prime Minister of Great Britain and many other leaders for their unreserved support for Israel” – Ministry of Foreign Affairs of Israel, Press Release, [Statement by Prime Minister Benjamin Netanyahu](#), 7 October 2023.

⁷ [Statement](#) by Israeli Defence Minister Yoav Gallant, 9 October 2023.

⁸ [Video released](#) by the Israeli Ministry of Defense, Kipa News, 10 October 2023. Translation in Emanuel Fabian, “Gallant: Israel moving to full offense, Gaza will never return to what it was”, The Times of Israel (10 October 2023).

⁹ [Video released](#) by the Israeli Ministry of Defense, Kipa News, 10 October 2023. Translation in “Israeli Defense Minister Warns Hamas ‘Will Regret’ Deadly Attacks”, Bloomberg (10 October 2023).

¹⁰ Bill Hutchinson, “[Bombarded by Israeli airstrikes, conditions in Gaza grow more dire as power goes out](#)”, ABC News (12 October 2023).

¹¹ [“By abducting over 100 people into Gaza, Hamas has put Netanyahu in a political bind”](#), The Times of Israel (8 October 2023).

¹² European Commission, [‘Statement by President von der Leyen with Israeli Prime Minister Netanyahu’](#), 14 October 2023.

15. This statement was made while two days before, on 12 October 2023, President Isaac Herzog had made clear that Israel was not distinguishing between militants and civilians in Gaza, stating in a press conference to foreign media — in relation Palestinians in Gaza, over one million of whom are children: “It’s an entire nation out there that is responsible. It’s not true this rhetoric about civilians not aware not involved. It’s absolutely not true. … and we will fight until we break their backbone”.¹³ Netanyahu, for his part, had already stated at that time (on 13 October 2023) that “[w]e are striking our enemies with unprecedented might”.¹⁴ On 15 October 2023, when Israeli airstrikes had already killed over 2,670 Palestinians, including 724 children,¹⁵ the Prime Minister stated that Israeli soldiers “understand the scope of the mission” and stand ready “to defeat the bloodthirsty monsters who have risen against [Israel] to destroy us”.¹⁶ And the Israeli Minister of Energy and Infrastructure Israel Katz had already stated, on 13 October 2023: “All the civilian population in Gaza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world.”¹⁷ The day before (12 October 2023), he had ‘tweeted’: “Humanitarian aid to Gaza? No electrical switch will be turned on, no water hydrant will be opened and no fuel truck will enter until the Israeli abductees are returned home. Humanitarianism for humanitarianism. And no one will preach us morality”.¹⁸

16. On 17 October 2023, back from her visit to Israel, von der Leyen addressed an extraordinary meeting of the European Council, with a reference to “another heinous terror attack perpetrated by Hamas on Israel. 1,400 Israelis and other nationals massacred in one single day. Hamas taking close to 200 hostages. We call for their immediate release. In Israel, I spoke to families. For example, a family whose 82-year-old grandmother had been abducted by Hamas; a mother that was desperately looking for her 22-year-old daughter, abducted by Hamas at the festival in Israel”.¹⁹ “In the face of this”, von der Leyen asserted, “it is clear to everyone that Israel has the right to defend itself in line with international and humanitarian law”.²⁰ She then added: “But that is not all. Hamas’ terror is also bringing immense suffering to the Palestinian people”.²¹ “So, we have to care for the Palestinian people and their

¹³ Rageh Omaar, [‘Israeli president Isaac Herzog says Gazans could have risen up to fight ‘evil’ Hamas’](#), ITV News 13 October 2023.

¹⁴ [Address](#) by the Prime Minister of Israel, (13 October 2023). Translation in [“Only the beginning’ says Netanyahu as Israel makes first raids into Gaza”](#), Reuters (13 October 2023).

¹⁵ UNICEF, [Immediate Needs Document in the State of Palestine \(October – December 2023\)](#) (17 October 2023), (Total as of 17:45, 15 October 2023; children as of 12:00, 14 October 2023)

¹⁶ Israel Prime Minister’s Office, [PM Netanyahu asks Ministers to Rise for a Moment of Silence](#) (15 October 2023).

¹⁷ 7 Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, [@Israel_katz](#), [Tweet](#) (6:01 pm, October 13, 2023).

¹⁸ Israel Katz, Minister of Energy and Infrastructure, Member of the Political-Security Cabinet, Member of Knesset, [@Israel_katz](#), [Tweet](#) (7:34 am, October 12, 2023). Translation in [“First Thing: no power, water or fuel for Gaza until hostages are freed, Israel says”](#), *The Guardian* (12 October 2023).

¹⁹ European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

²⁰ European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

²¹ European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

humanitarian needs. There is no contradiction in standing in solidarity with Israel and acting for the humanitarian needs of the Palestinians.²²

17. Then on **18 October 2023**, von der Leyen stated before the European Parliament: “Israel has the right to self-defence, in line with international law. Hamas are terrorists. And the Palestinian people are also suffering from that terror. And we have to support them. And there is no contradiction in standing in solidarity with Israel and acting on the humanitarian needs of the Palestinian people. I have visited Israel many times in my life. But this time, I saw a nation that is shocked to the core. I was struck to hear the same request from all the people I spoke to. From President Herzog, from Prime Minister Netanyahu, all forces in the unity government, from families of the abducted. They all asked for solidarity and clear words. And this is the least we can do for the people of Israel. This horror calls for a united response from us. As human beings, as defenders of a free world, as citizens of Europe where hate, terror and racism have no place. Europe stands with Israel in this dark moment”.²³ “This is the essential starting point. And I believe it was important to pass this message of solidarity in person, in Israel, just days after the Hamas attack. Only if we acknowledge Israel's pain, and its right to defend itself, will we have the credibility to say that Israel should react as a democracy, in line with international humanitarian law. And that it is crucial to protect civilian lives, even and especially in the middle of a war”.²⁴

18. Two days before this address to the European Parliament, on **16 October 2023**, Israeli Prime Minister Netanyahu, in a formal address to the Israeli Knesset, had described the situation as “a struggle between the children of light and the children of darkness, between humanity and the law of the jungle”,²⁵ a dehumanising theme to which he returned on various occasions, including: on 3 November 2023, in a letter to Israeli soldiers and officers also published on the platform ‘X’ (formerly Twitter); the letter asserted that: “[t]his is the war between the sons of light and the sons of darkness. We will not let up on our mission until the light overcomes the darkness — the good will defeat the extreme evil that threatens us and the entire world”.²⁶ The Israeli Prime Minister also returned to the theme in his ‘Christmas message’, stating: “we're facing monsters, monsters who murdered children in front of their parents [...] This is a battle not only of Israel against these barbarians, it's a battle of civilization against barbarism”.²⁷ On 28 October 2023, as Israeli forces prepared their land invasion of Gaza, the Prime Minister invoked the Biblical story of the total destruction of Amalek by the Israelites, stating: “you must remember what Amalek has done to you, says

²² European Commission, [Opening statement by President von der Leyen at the joint press conference with President Michel on the occasion of the extraordinary meeting of the European Council](#), 17 October 2023.

²³ European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

²⁴ European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel's right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

²⁵ Israel Ministry of Foreign Affairs, [Press Release](#): Excerpt from PM Netanyahu's remarks at the opening of the Winter Assembly of the 25th Knesset's Second Session, 16 October 2023.

²⁶ Prime Minister's Office in Hebrew, @IsraeliPM_heb, [Tweet](#) (11:44 am, November 3, 2023).

²⁷ Israel Ministry of Foreign Affairs, [Christmas message](#) from PM Netanyahu, 24 December 2023.

our Holy Bible. And we do remember".²⁸ The Prime Minister referred again to Amalek in the letter sent on 3 November 2023 to Israeli soldiers and officers.²⁹ The relevant biblical passage reads as follows: "Now go, attack Amalek, and proscribe all that belongs to him. Spare no one, but kill alike men and women, infants and sucklings, oxen and sheep, camels and asses".³⁰

19. It is to be noted that in that context, hundreds of EU officials and staff in a confidential letter to von der Leyen on **21 October 2023** criticized her for "the *unconditional support* by the Commission [she] represent[s] for one of the two parties". "We hardly recognize the values of the EU in *the seeming indifference demonstrated over the past few days by our Institution* toward the ongoing massacre of civilians in the Gaza Strip, in disregard for human rights and international humanitarian law". They denounced a "patent show of double-standards which considers the blockade (water and fuel) operated by Russia on the Ukrainian people as an act of terror whilst the identical act by Israel against the Gazan people is completely ignored. We cannot remain silent observers when the Institution you represent as President not only has been unable to halt the Palestinian tragedy unfolding for decades in full impunity, but by its recent unfortunate actions or positions *seem to give a free hand to the acceleration and the legitimacy of a war crime in the Gaza Strip*".³¹

20. On **22 October 2023**, Mrs. von der Leyen reiterated previous statements during a speech to the youth organization of her German CDU/CSU political group in Braunschweig, Germany. While stating that any Israeli defense against the Hamas terrorist group must be "in accordance with international law," she stressed that "[t]here is no contradiction in standing in solidarity with Israel and providing humanitarian aid in Gaza.". She also compared Israel's role in the conflict to Ukraine's defense against Russian aggression: "All these conflicts have one thing in common: they are about the struggle between those who seek peace, balance, freedom and cooperation — and those who do not want any of this because they profit from the chaos and disorder".³²

21. This brief summary of statements made and actions taken by President von der Leyen, against the background of some of the most striking public genocidal statements and war crimes committed by the IDF in the Gaza Strip, could be indefinitely expanded to the present day. It has been deemed unnecessary by the authors of the present communication to add to this brief summary, even if documentary evidence of similar statements and actions may need to continue to be collected.

²⁸ [Address](#) by the Prime Minister of Israel, 28 October 2023. Translation in "["Israel-Hamas war: 'We will fight and we will win', says Benjamin Netanyahu"](#)", *Sky News* (28 October 2023).

²⁹ Prime Minister's Office in Hebrew, @IsraeliPM_heb, [Tweet](#) (11:43 am November 3, 2023).

³⁰ I Samuel 15:1-34.

³¹ [Letter](#) from 850 EU officials and staff to EC President von der Leyen, 21 October 2023 (emphasis added).

³² See Politico, '[Von der Leyen doubles down on pro-Israel stance, lashes out at Iran](#)', 22 October 2023.

D. General standards of complicity in international criminal law

22. Article 25 para. 3 of the Rome Statute (*Individual criminal responsibility*) provides for the criminal responsibility for complicity of those ‘aiding and abetting or otherwise assisting’ the commission of crimes covered by the jurisdiction of the Court, in the following terms:

In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

[...]

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission.

23. The terms ‘aiding and abetting’ in the context of the ICC are not interchangeable: the wording of Article 25(3)(c) of the ICC Statute indicates that each of them has its own meaning.³³ More specifically, ‘aiding’ refers to the provision of practical or material assistance to the commission of a crime, while ‘abetting’ denotes the provision of encouragement or moral support to the commission of a crime. Aiding and abetting is therefore an accessory mode of liability where the accused is alleged to have facilitated the commission (or, at least, the attempted commission) of crimes by others (i.e. the principals).³⁴

24. The wording of Article 25(3)(c) also makes clear that aiding and abetting are just two ways of other possible forms of ‘assistance’, the latter thus serving as a sort of umbrella term.³⁵ Thus, ‘providing the means’ for the commission of a crime is merely a special example of assistance.³⁶

1. The material element (*actus reus*) standard of complicity

25. As far as the material element (*actus reus*) is concerned, the following elements of ‘aiding and abetting’ liability, as per Article 25(3)(c) of the ICC Statute, and in light of the jurisprudence of *ad hoc* and hybrid international criminal tribunals, are well established and not controversial:

³³ A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. I, p. 798.

³⁴ M.J. Ventura, ‘Aiding and Abetting’, in J. de Hemptinne, R. Roth and E. van Sliedregt (eds), *Modes of Liability in International Criminal Law* (Cambridge: Cambridge University Press, 2019) 173-256, para. 2. See also A. Eser, ‘Individual Criminal Responsibility’, *supra* note 33, vol. I, p. 798.

³⁵ A. Eser, ‘Individual Criminal Responsibility’, *supra* note 33, vol. I, p. 798.

³⁶ A. Eser, ‘Individual Criminal Responsibility’, *supra* note 33, vol. I, p. 798.

- First, the *actus reus* can occur before, during or after the crime in question is committed.³⁷
- The location of where the *actus reus* takes place can be remote from the time and location of where the crime in question is committed;³⁸ the accused need not have been personally present during the commission of the crime.³⁹
- Encouragement or moral support need not be explicit; the act of being present at or near the crime scene as a silent spectator, particularly when the accused is in a position of authority, can be construed as tacit approval or encouragement of the crime.⁴⁰
- According to Article 25(3)(c) of the ICC Statute, the *attempted commission* of a crime is sufficient for the ‘aiding and abetting’ liability to arise, i.e. there is no need for the crime in question to have been fully carried out or completed. The underlying rationale is that complicity by assistance is, like instigation, a form of accessory liability in relation to the principal crime; this means that it must assist the accomplishment (or at least the attempt) of a crime. Therefore, preparatory contributions, though determined to enable the commission of a crime, remain unpunishable if the intended principal crime is not carried out. If, however, the principal crime reaches at least the stage of an attempt, it does not matter at what time and place during the preparation and performance of the crime the assistance was rendered.⁴¹
- The support of the aider and abettor must have had a substantial effect upon the perpetration of the crime.⁴² However, it has been held by the jurisprudence that no minimum threshold is required for the contribution to be considered as having had an effect: ‘the elements of this mode of liability are met in so far as the accessory’s contribution had an effect on the commission of the offence’.⁴³ It has been considered sufficient for ‘the person [to] provide[] assistance to the commission of a crime’ without stipulating the requisite level of contribution to the crimes.⁴⁴ In substance, ‘the form of contribution under Article 25(3)(c) [...] does not require the meeting of any specific threshold’.⁴⁵

³⁷ See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, IT- 95-14-A, 29 July 2004, para. 48

³⁸ See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, *supra* note 37, para. 48.

³⁹ See e.g. SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para 370.

⁴⁰ ICTY, *Brđanin*, Appeals Chamber Judgment, IT-99-36-A, 3 April 2007, para. 273: ‘An accused can be convicted for aiding and abetting a crime when it is established that his conduct amounted to tacit approval and encouragement of the crime and that such conduct substantially contributed to the crime’.

⁴¹ A. Eser, ‘Individual Criminal Responsibility’, in A. Cassese, P. Gaeta, J. R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002), vol. I, pp. 798-799.

⁴² See e.g. ICTY, *Blaškić*, Appeals Chamber Judgment, *supra* note 37, para. 48.

⁴³ ICC, *Bemba et al.*, Confirmation of Charges Decision, ICC-01/05-01/13-749, 11 November 2014, para 35.

⁴⁴ ICC, *Blé Goudé*, Confirmation of Charges Decision, ICC-02/11-02/11-186, 11 December 2014, para 167.

⁴⁵ ICC, *Bemba et al.*, Trial Chamber Judgment, ICC-01/05-01/13-1989-Red, 19 October 2016, para 93.

- No evidence of a plan or agreement between the aider and abettor and the principal perpetrator is required.⁴⁶
- It is not necessary for the accused to have had authority or control over the principal perpetrator.⁴⁷
- The assistance need not be given directly to the principal perpetrator and used by him/her in the commission of the crime; the essential question is whether the accused's acts and conduct can be said to have contributed substantially to the commission of the crime rather than to the principal perpetrator.⁴⁸
- It is not necessary to establish that the aider and abettor's contribution served as a precondition to the crime or that the crime would not have occurred but for the aider and abettor's contribution (i.e. that the contribution was a *sine qua non*).⁴⁹

26. Complicity under the form of 'aiding and abetting' can also arise *by omission*. It is now well recognized that an omission is another way that the conduct element of aiding and abetting liability may be fulfilled.⁵⁰ As regards complicity by omission, the following requirements generally apply:

- Aiding and abetting by omission requires the accused to have a legal duty to act in the circumstances considered.⁵¹
- To attract aiding and abetting by omission liability, the accused must have had the ability to act; means must have been available to the accused to fulfil his/her duty to act.⁵²

⁴⁶ ICTY, *Tadić*, Appeals Chamber Judgment, IT-94-1-A, 15 July 1999, para 229(ii); ICTY, *Simić et al.*, Trial Chamber Judgment, IT-95-9-T, 17 October 2003, para 162; ICTY, *Brđanin*, Appeals Chamber Judgment, supra note 40, para 263; ECCC, *Kaing* Trial Chamber Judgment, 001/18-07-2007/ECCC/TC/E188, 26 July 2010, para 534; SCSL, *Taylor* Trial Chamber Judgment, SCSL-03-01-T, 18 May 2012, para 484.

⁴⁷ *Taylor* Appeal Judgment, supra note 39, para 370. See also ICTY, *Aleksovski* Appeals Chamber Judgment, IT-95-14/1-A, 24 March 2000, para 170.

⁴⁸ *Taylor* Appeal Judgment, supra note 39, paras 367-368 and 401; *Bemba et al.*, Appeals Chamber Judgment, ICC-01/05-01/13-2275-Red, 8 March 2018, paras 19, 1329

⁴⁹ Thus, "proof of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required", ICTY, *Blaškić*, Appeals Chamber Judgment, supra note 37, para. 48.

⁵⁰ See M. Jackson, *Complicity in International Law* (Oxford: Oxford University Press, 2015) 98.

⁵¹ ICTY, *Popović et al.* Appeals Chamber Judgment, IT-05-88-A, 30 January 2015, para 1740. See also ICTR, *Ntagerura et al.*, Appeals Chamber Judgment, ICTR-99-46-A, 7 July 2006, paras 334 (referring to all modes of liability under Article 6(1) of the ICTR Statute (which includes aiding and abetting)); ICTY, *Galić*, Appeals Chamber Judgment, IT-98-29-A, 30 November 2006, para 175.

⁵² *Ntagerura et al.* Appeal Judgment, supra note 51, para 335; ICTY, *Mrkšić and Šljivančanin* Appeals Chamber Judgment, IT-95-13/1-A, 5 May 2009, paras 49, 82 and 154; ICTY, *Šainović et al.*, Appeals Chamber Judgment, IT-05-87-A, 23 January 2014, para 1677.

- In aiding and abetting by omission cases, the *actus reus* is satisfied if the crimes would have been substantially less likely had the accused acted pursuant to his/her legal duty to act.⁵³

2. The *mens rea* standard

27. As regards the *mens rea* requirements for aiding and abetting liability, the following requirements are generally understood to apply:

- The accused need not know the precise crime which was intended and which was committed by the principal, but he/she must be aware of its essential elements, including the state of mind of the principal.⁵⁴
- The accused need not share the intent of the principal perpetrator.⁵⁵
- As set out above, Article 25(3)(c) of the ICC Statute requires an aider and abettor to act ‘[f]or the *purpose* of facilitating the commission of [...] a crime’ (emphasis added). The requirement that assistance be given ‘for the purpose of facilitating the commission of’ a crime has generally been understood as fulfilled where the accused had *knowledge* of the consequence of his acts or conduct on the commission of the crimes.
- The required *mens rea* element of aiding and abetting is characterised where the accused can be deemed to have been ‘aware of the substantial likelihood’ that his conduct would assist in the commission of the crimes. It has been consistently held by the jurisprudence that ‘awareness of the substantial likelihood’ is a culpable mental state for aiding and abetting under customary international law.⁵⁶ This jurisprudence

⁵³ *Mrkšić and Šljivančanin* Appeal Judgment, supra note 52, paras 97 and 100; *Šainović et al.* Appeal Judgment, supra note 52, paras 1679 and 1682, fn. 5510; *Popović et al.* Appeal Judgment, supra note 51, paras 1741 and 1744.

⁵⁴ *Aleksovski* Appeal Judgment, supra note 47, paras 162 and 164; ICTY, *Krnojelac* Appeals Chamber Judgment, IT-97-25-A, 17 September 2003, paras 51-52; ICTY, *Blaškić* Appeal Judgment, supra note 37, para 50; ICTY, *Simić* Appeal Judgment, Appeals Chamber Judgment, IT-95-9-A, 28 November 2006, para 86; *Brđanin* Appeal Judgment, supra note 40, para 484; *Blagojević and Jokić* Appeals Chamber Judgment, IT-02-60-A, 9 May 2007, para 221; ICTR, *Nahimana et al.* Appeals Chamber Judgment, ICTR-99-52-A, 28 November 2007, para 482; ICTR, *Karera* Appeals Chamber Judgment, ICTR-01-74-A, 2 February 2009, para 321; *Mrkšić and Šljivančanin* Appeal Judgment, supra note 52, para 159; ICTY, *Lukić and Lukić*, Appeals Chamber Judgment, IT-98-32/1-A, 4 December 2012, para 440; ICTY, *Perišić*, Appeals Chamber Judgment, IT-04-81-A, 28 February 2013, para 48.

⁵⁵ *Krnojelac* Appeal Judgment, supra note 54, paras 51-52; ICTY, *Krstić*, Appeals Chamber Judgment, IT-98-33-A, 19 April 2004, paras 140; *Simić* Appeal Judgment, supra note 54, para 86; ICTR, *Seromba*, Appeals Chamber Judgment, ICTR-2001-66-A, 12 March 2008, para 56; *Kaing* Trial Judgment, supra note 46, para 535; STL, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Appeals Chamber, STL-11-01/I/AC/R176bis/F0936, 16 February 2011, para 225; ECCC, *Nuon and Khieu*, 002/01 Trial Judgment, 002/19-09-2007/ECCC/TC/E313, 7 August 2014, para 704; MICT, *Ngirabatware*, Appeals Chamber Judgment, MICT-12-29-A, 18 December 2014, para 155.

⁵⁶ See *Brima et al.* Appeal Judgment, para. 242: ‘[t]he mens rea required for aiding and abetting is that the accused knew that his acts would assist the commission of the crime by the perpetrator or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator’ (quoting *Brima et al.* Trial Judgment, para. 776); *Sesay et al.* Appeal Judgment, para. 546. The STL Appeals Chamber subsequently

is consistent with the principle that awareness and acceptance of the substantially likely consequence of one's acts and conduct constitutes culpability.⁵⁷

E. Complicity by aiding and abetting in the context of support to Israeli actions

1. Forms of assistance rendered by the President of the European Commission

28. As already mentioned, the present communication is intended to draw the attention of the Office of the Prosecutor on the plausible liability for complicity of President of the European Commission Ursula von der Leyen, in relation to the rendering of aid and assistance under various forms to the Government of Israel as well as specifically to the IDF, that are currently engaged in armed operations in the Gaza Strip and, in that context, have been engaged in a series of violations of international humanitarian law, many of which are likely to qualify as international crimes.

29. The aid and assistance in question has been rendered by Mrs. von der Leyen under various forms, including:

- political and economic support;
- military support;
- diplomatic support.

30. Political and economic support to Israel has taken *inter alia* the form of (i) the maintenance of existing international agreements between the EU and Israel, in disregard to human right clauses on the conditionality of such agreements, and (ii) the promotion and development of new frameworks and mechanisms of bilateral cooperation with Israel.

31. Existing bilateral agreements between the EU and Israel include the EU-Israel Association Agreement, which entered into force in June 2000.⁵⁸ This agreement aims to provide an appropriate legal and institutional framework for political dialogue and economic cooperation between the EU and Israel. By virtue of this agreement, the Israeli economy benefits from a free trade area encompassing the EU area. Article 2 of the agreement provides that “the relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect for human rights and democratic principles, which guides their internal and international policy and constitutes an essential element of this Agreement”, making the application of the Agreement conditional upon respect of human rights. Article 79(2) of the Agreement provides that “if either Party considers that the other Party has failed

endorsed this Court's jurisprudence that awareness of a substantial likelihood is a culpable mens rea for aiding and abetting liability in customary international law. STL Applicable Law Decision, para. 227.

⁵⁷ SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para. 438.

⁵⁸ See Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, *EU Official Journal*, 21 June 2000, L 147/3.

to fulfil an obligation under the Agreement, it may take appropriate measures”. Since the start of the current Israeli military offensive on Gaza, the EU Commission has failed to invoke these provisions, despite having been called to do so by the Governments of Ireland and Spain.⁵⁹ Such failure to suspend the EU-Israel Association Agreement is at odds with the EU’s own policies in terms of human rights clauses in trade agreements.⁶⁰ The EU claims in that regard that it takes steps to ensure that bilaterally agreed human rights provisions apply to all its trade agreements, and thus to use its leverage as the world’s biggest trade bloc in order to promote respect for these rights together with its trade partners. Today, human rights feature prominently in most of the EU’s agreements, commercial and non-commercial ones, with third countries. This is in line with EU’s official policy on the matter as outlined in the “Common Approach on the use of political clauses”, agreed in 2009.

32. In terms of economic interdependence between Israel and the European Union, it is to be recalled that while Israel is only the EU’s 25th biggest trade partner, representing 0.8% of the EU’s total trade in goods in 2022, the EU is Israel’s biggest trade partner, accounting for 28.8% of its trade in goods in 2022. That same year, 31.9% of Israel’s imports came from the EU, and 25.6% of the country’s exports went to the EU. Total trade in goods between the EU and Israel in 2022 amounted to €46.8 billion. The EU’s imports from Israel were worth €17.5 billion and were led by machinery and transport equipment (€7.6 billion, 43.5%), chemicals (€3.5 billion, 20.1%), and other manufactured goods (€1.9 billion, 11.1%). The EU’s exports to Israel amounted to €12.2 billion and were dominated by machinery and transport equipment (€12.3 billion, 41.9%), chemicals (€5.1 billion, 17.6%), and other manufactured goods (€3.5 billion, 12.1%). Two-way trade in services between the EU and Israel amounted to €16.7 billion in 2021. EU imports of services represented €6.9 billion, while exports accounted for €9.8 billion.⁶¹ These data point to the very significant reliance by Israel on EU imports.

33. The European Commission, with President von der Leyen at its head, has also been active in promoting new EU-Israel cooperation instruments, such as the EU Commission Action “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”.⁶² This Action aims to allocate EU resources “to reinforce EU-Israel bilateral relations, in a wider effort to strengthen regional stability in support of the Abraham Accords, in particular in light of the Hamas attack on Israel on 7 October and the subsequent escalation which is exacerbating regional tensions and risks serious spill overs in the neighbouring countries”. The Action is structured along three objectives, including “[s]upport to strategic policy dialogues and exchanges between the EU and Israel, including the development of technical capabilities and approximation of EU-Israel legislation”. It aims at “deepening the EU-Israel relations by framing interactions and

⁵⁹ [‘Spain and Ireland call for ‘urgent review’ of EU-Israel agreement over war in Gaza’](#), Euronews, 14 February 2024.

⁶⁰ [Human rights in EU trade agreements The human rights clause and its application](#) (European Parliamentary Research Service, July 2019).

⁶¹ See European Commission, ‘[EU trade relations with Israel. Facts, figures and latest developments](#)’ (accessed on 29 March 2024).

⁶² See [Action Document](#) for “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”, Annex to the Commission Implementing Decision on the financing of the 2023 action plan part III in favour of the Regional South Neighbourhood, 2023.

collaborations”. The Action has been adopted by the European Commission on 28 November 2023.⁶³

34. President von der Leyen has also been instrumental in building, at the international level and in the framework of various international organisations, diplomatic support to Israel intended to facilitate Israel’s actions in the Gaza Strip. This support came as a response to the demand formulated by Prime Minister Netanyahu as early as of 7 October 2023 to various world leaders, “to ensure freedom of action for Israel in the continuation of the campaign”.⁶⁴ In particular, expressions such as “Europe stands with Israel”⁶⁵ used repeatedly at a time when disproportionate and indiscriminate attacks in violation of international humanitarian law were conducted, and had already caused huge human losses and widespread suffering, undeniably qualify as a form of “abetting” in the meaning of Article 25(3)(c) of the ICC Statute, especially when no explicit condemnation of these violations of international humanitarian law is made, or at least is explicitly blamed on (or attributed to) the perpetrators.

2. Legal characterisation of assistance provided the President of the European Commission

35. In that context, it is submitted that President of the European Commission von der Leyen:

- has provided Israel with positive assistance to Israel under various forms, and that such assistance has had a *substantial effect* upon the perpetration of the relevant crimes;
- could not but have *knowledge* that she was (and still is) participating, by aiding and abetting the perpetrators, in the commission of the relevant crimes;
- has also *failed to act* to prevent the commission of the relevant crimes. She is thus *complicit by omission*.

⁶³ See [Commission Implementing Decision](#) of 28 November 2023 on the financing of the 2023 annual action plan part III in favour of the Regional South Neighbourhood, Doc. C(2023) 8324 final.

⁶⁴ Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

⁶⁵ See e.g. European Commission, [Speech by President von der Leyen](#) at the EP Plenary debate on the despicable terrorist attacks by Hamas against Israel, Israel’s right to defend itself in line with humanitarian and international law and the humanitarian situation in Gaza, 18 October 2023.

(i) Positive assistance by the President of the European Commission to Israel has had a *substantial effect* upon the perpetration of the relevant crimes

36. It is submitted that President von der Leyen has had an instrumental role in providing support to Israel under various forms; and that such support has had a substantial effect upon the perpetration of the relevant crimes.

37. *First*, Mrs. von der Leyen, in her official capacity as president of the European Commission, has been instrumental in securing the provision of means, under the form of military support, to the IDF.

38. The competence of the European Commission may need to be briefly recalled. The main role of the European Commission, as defined by Article 17 of the Treaty on European Union, is to “ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union”.⁶⁶ In that context, one of the tasks of the European Commission is to oversee implementation of the current EU framework regulating the export of arms by EU Member States, i.e. the Council Common Position on arms exports of 8 December 2008.⁶⁷ The aim of this EU Common Position, as set out in its Preamble, is to “prevent the export of military technology and equipment which might be used for internal repression or international aggression or contribute to regional instability”. Article 2 of the EU Common Position sets various criteria, including the following:

2. Criterion Two: Respect for human rights in the country of final destination as well as respect by that country of international humanitarian law.

— Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States shall:

(a) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used for internal repression;

(b) exercise special caution and vigilance in issuing licences, on a case-by-case basis and taking account of the nature of the military technology or equipment, to countries where serious violations of human rights have been established by the competent bodies of the United Nations, by the European Union or by the Council of Europe.

— Having assessed the recipient country’s attitude towards relevant principles established by instruments of international humanitarian law, Member States shall:

⁶⁶ Consolidated version of the Treaty on European Union, EU Official Journal, C 202/1, 7 June 2016, Art. 17.

⁶⁷ See Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, EU Official Journal L 335, 13 December 2008, p. 99.

(c) deny an export licence if there is a clear risk that the military technology or equipment to be exported might be used in the commission of serious violations of international humanitarian law.⁶⁸

39. The European Commission under Mrs von der Leyen has claimed an active role in the prevention of human rights violations in the context of arms exports. For example, the European Commission has dealt with EU export controls for dual-use items, with a view to ensuring that “items such as advanced electronics, toxins, missile technology or nuclear components, which have civil but also military uses, do not get into the wrong hands. Dual-use items are therefore subject to authorisations when exported outside the EU, limiting the possibility for such items to be used in war or conflict situations, for breaches of human rights or to enable the proliferation of weapons of mass destruction”.⁶⁹

40. Against that background, it was reported that during the period 2019-23, Israel has been the 3rd main recipient of weapons provided by Germany, itself the 5th largest exporter of major arms in the world (Germany’s share in global arms exports is 5,6%). Israel received during that period 12% of Germany’s total exports of military equipment.⁷⁰ SIPRI has reported that “[b]etween 2014–18 and 2019–23, [...] the USA accounted for 69 per cent and Germany for 30 per cent of Israeli arms imports”,⁷¹ and that “[b]y the end of 2023, pending deliveries of major arms to Israel included 61 combat aircraft from the USA and 4 submarines from Germany”.⁷²

41. It should be stressed that is commonly accepted by the jurisprudence of international criminal tribunals that “[p]rocuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes”.⁷³ It can be recalled in that respect that a Dutch Court of Appeals found in 2007 in the *Van Anraat* case that an industrialist who had supplied chemicals to Iraq was complicit, aiding and abetting, in the commission of war crimes committed using mustard gas in the course of repression of the Kurds uprising.⁷⁴

42. *Second*, President von der Leyen has provided economic and financial support to Israel, both by refusing to take any steps toward the suspension of the EU-Israel Association Agreement (despite the human rights clause in that instrument calling for such suspension in accordance with the EU policy on conditionality of international agreements), and by promoting, amidst the current Israeli assault on Gaza, new EU-Israel cooperation instruments,

⁶⁸ Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, EU Official Journal L 335, 13 December 2008, p. 99, Art. 2.

⁶⁹ See European Commission, *White Paper on Export Controls*, Brussels, 24 January 2024, COM(2024) 25 final, at p. 2.

⁷⁰ See SIPRI Fact Sheet, [*Trends in International Arms Transfers, 2023*](#), March 2024, p. 2.

⁷¹ SIPRI Fact Sheet, [*Trends in International Arms Transfers, 2023*](#), March 2024, p. 11.

⁷² SIPRI Fact Sheet, [*Trends in International Arms Transfers, 2023*](#), March 2024, p. 12.

⁷³ ICTR, *Akayesu*, Trial Judgement, ICTR-96-4-T, 2 September 1998, para. 536.

⁷⁴ Public Prosecutor v Van Anraat, The Hague Court of Appeal, 9 May 2007, ECLI:NL:GHSGR:2007:BA4676, at 13.

such as the EU Commission Action “Regional EU-Israel cooperation in support of the Abraham Accords, and fight against antisemitism and fostering Jewish life”.

43. *Third*, President von der Leyen has provided diplomatic support to the Israeli government, in what appears to be a response to the demand – already quoted – formulated by Prime Minister Netanyahu on 7 October 2023, on the international community “to ensure freedom of action for Israel in the continuation of the campaign”.⁷⁵ Ensuring “freedom of action” to Israel has amounted to enabling the IDF to “continue [its] campaign” to this day and even intensify its attacks against Palestinian civilians, inflicting human losses, destruction and suffering of a magnitude and scale without equivalent in any contemporary armed conflict, as affirmed by military experts. It is submitted that the diplomatic support enjoyed by Israel from President von der Leyen (as well as from many other world leaders) has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October.

44. *Fourth* and last, President von der Leyen has provided moral support to the perpetrators of the crimes. It is indeed obvious that, by their plain terms, the various official statements of Mrs. von der Leyen expressing unconditional support to Israel have amounted to (and could not reasonably be understood otherwise than) giving encouragement and moral support to members of the IDF, who were (and still are) involved in the commission of crimes against the Palestinian population in the OPT. Moreover, such statements are likely to have improved the morale of IDF troops. These elements (i.e. conduct amounting to encouragement and moral support, improving morale of soldiers), have been considered by international criminal tribunals, if duly established in a particular case, as indicative of a conduct able to be considered as aiding and abetting the commission of relevant crimes.⁷⁶

45. It is to be stressed in that context that the public statements and actions of Mrs. von der Leyen stand in stark contrast to those of the authority entrusted with the task to “conduct the Union's common foreign and security policy”⁷⁷, i.e. the High Representative of the Union for Foreign Affairs and Security Policy, Mr. Josep Borrell. After an informal meeting of European Union foreign ministers on 10 October 2023, Josep Borrell stated that “Israel has the right to defend itself, but some of its actions since Hamas attack counter international humanitarian law”.⁷⁸ On 6 November 2023, during the European Union Ambassadors’ Conference, he expressed “concern about the continued colonization of the West Bank, noting a significant increase in the number of settlers over the past 30 years. He stressed the necessity of a comprehensive and final settlement in the Israeli-Palestinian conflict as a “last chance” to resolve the two-state issue”.⁷⁹ On 13 November, Josep Borrell discussed again the crisis in Gaza, affirming the EU’s collective call for an immediate humanitarian ceasefire, and “stated

⁷⁵ Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

⁷⁶ See e.g. ICTY, Šainović *et al.* Appeal Judgment, *supra* note 52, paras. 1687-1690.

⁷⁷ See Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (EU Official Journal, 2007/C 306/01), Art. 9E.

⁷⁸ See [Israel has right to self-defence, but some actions 'counter international law' – Borrell](#), Euronews, 10 October 2023.

⁷⁹ See [EU Ambassadors Conference 2023: Opening speech by High Representative/Vice-President Josep Borrell](#), European External Action Service, 6 November 2023.

“no” to forced displacement of the Palestinian people, reducing the size of the Gaza Strip, and separating Gaza from the broader Palestinian issue.⁸⁰ In February 2024, at a press conference with UNWRA Commissioner-General Philippe Lazzarini, Borrell called for stopping arms deliveries to Israel.⁸¹

(ii) The President of the European Commission had *knowledge* of participating, by aiding and abetting, in the commission of the relevant crimes

46. It is submitted that President von der Leyen necessarily had knowledge that she has been (and still is) participating, by aiding and abetting the perpetrators, in the commission of the relevant crimes. Her knowledge of the consequences of her acts or conduct establishes the required *mens rea* for personal liability for complicity by aiding and abetting.

47. An examination of the post-World War II jurisprudence of international criminal courts, as indicative of customary international law, supports the assertion that an accused’s knowledge that he was participating in the commission of the crime – that is, an accused’s knowledge of the consequence of his acts or conduct – establishes the *mens rea* for personal liability.⁸²

48. This standard of “knowledge” was applied *inter alia* by the International Military Tribunal (IMT). Article 6 of the Charter of the IMT established individual criminal liability for “[l]eaders, organizers, instigators, *and accomplices* participating in the formulation or execution of a Common Plan or Conspiracy to commit [the crimes].”⁸³ The IMT found:

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and business men. When they, with knowledge of his aims, gave him their co-operation, they made themselves parties

⁸⁰ See [Foreign Affairs Council: Press remarks by High Representative Josep Borrell after the meeting](#), 13 November 2023.

⁸¹ See [AlJazeera report](#), 12 February 2024, mentioning the following: “European Union foreign policy chief Josep Borrell has urged allies of Israel, primarily the United States, to stop sending it weapons as “too many people” are being killed in Gaza. Pointing to US President Joe Biden’s comment last week that Israel’s military action was “over the top”, Borrell said on Monday: “Well, if you believe that too many people are being killed, maybe you should provide less arms in order to prevent so many people having been killed.” “Is [it] not logical?” he asked, in a Brussels news conference alongside Philippe Lazzarini, head of the United Nations Relief and Works Agency for Palestine Refugees (UNRWA) [...]. “How many times have you heard the most prominent leaders and foreign ministers around the world saying too many people are being killed?” Borrell asked. “If the international community believes that this is a slaughter, that too many people are being killed, maybe we have to think about the provision of arms,” Borrell added. The chief EU diplomat also slammed an order by Israeli Prime Minister Benjamin Netanyahu that the more than one million Palestinians sheltering in the Gaza city of Rafah need to be “evacuated” ahead of a planned Israeli military operation there. “They are going to evacuate – where? To the moon? Where are they going to evacuate these people?” Borrell asked”.

⁸² See e.g. SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, para. 419.

⁸³ IMT Charter, Art. 6 (emphasis added). The same provision can be found in Article 5 of the Charter of the International Military Tribunal for the Far East (IMTFE).

to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.⁸⁴

This is according to this standard that the IMT held accused personally liable for their knowing participation in the crimes.⁸⁵ For example, Von Schirach was found guilty in that “while he did not originate the policy of deporting Jews from Vienna, [he] participated in this deportation after he had become Gauleiter of Vienna. He knew that the best the Jews could hope for was a miserable existence in the ghettos of the East. Bulletins describing the Jewish extermination were in his office”.⁸⁶

49. The jurisprudence generally does not require that an accused directly intended that the consequence of his acts or conduct were to contribute to the commission of the crimes. Thus, for example, in the *Ministries* cases, adjudicated by military tribunals under Control Council Law No. 10, Von Weizsaecker and Woermann, senior officials in the German Foreign Ministry, were convicted for crimes against humanity. The Tribunal found that even though they neither willed nor desired the commission of the crimes, their knowledge that they were participating in the crimes was sufficient to establish the requisite mens rea:

“The mass deportation of Jews to the East which resulted in the extermination of many millions of them found its expression in the celebrated Wannsee conference of 20 January 1942. The Foreign Office played an important part in these negotiations and in the actions thereafter taken to implement and assist the program. *Von Weizsaecker or Woermann neither originated it, gave it enthusiastic support, nor in their hearts approved of it. The question is whether they knew of the program and whether in any substantial manner they aided, abetted, or implemented it*”.⁸⁷

50. Given the wide publicity given on a daily basis to the violations of international humanitarian law perpetrated by the IDF in the Gaza Strip, especially since October 2023, and the wealth of official United Nations reports and documents available, which as a matter of fact have prompted numerous UN officials - including the UN Secretary-General – to express their utmost concern, Mrs. von der Leyen cannot escape the simple fact that she knew of such crimes, or *at the very least* she knew of the *plausibility* of such crimes, as was found by the ICJ in its Order on provisional measures of 26 January 2024 as regards genocide. Even under the “*plausibility*” standard, she should have taken every possible action at her disposal to prevent the continued commission of such crimes, and at the very least not to facilitate in any manner the commission of these crimes, as she unfortunately did.

⁸⁴ IMT Judgment, p. 226.

⁸⁵ See e.g. the examples quoted in SCSL, *Taylor*, Appeals Chamber Judgment, SCSL-03-01-A, 26 September 2013, paras. 417-427.

⁸⁶ IMT Judgment, p. 319.

⁸⁷ *Ministries Case*, p. 478 (emphasis added).

(iii) The President of the European Commission has *failed to act* to prevent the commission of the relevant crimes

51. It is submitted that President von der Leyen has also *failed to act* to prevent the commission of the relevant crimes. They are thus *complicit by omission*.

In that respect, the following paragraphs demonstrate that the omissions by President von der Leyen fulfil the criteria set by the jurisprudence of international criminal courts and tribunals, as set out above.

(a) President von der Leyen was, and still is, under a legal duty to act in the circumstances considered

52. It is admitted that “international law [...] places upon a person vested with public authority a duty to act in order to protect human life”.⁸⁸ The reference to international law in that context extends *inter alia* to Common Article 1 of the Geneva Conventions.⁸⁹ Similarly, it seems undisputed that “all public authorities have a duty not only to comply with the basic rights of the human person, but also to ensure that these are complied with, which implies a duty to act in order to prevent any violation of such rights”.⁹⁰ This duty applies all the more since President von der Leyen, by virtue of her unique position as head of the European Commission, was reasonably expected to exercise due diligence on the likely consequences of her statements and actions taken with respect to Israel.

(b) President von der Leyen had, and still has, the ability to act; means were (and still are) available to her to fulfil her duty to act

53. President von der Leyen holds a unique position of authority as head of the European Commission. She undeniably had access to a wide range of means to fulfil her duty to act. That President von der Leyen had the ability to act may be illustrated (and confirmed) by a brief review of some actions taken by the European Commission under her presidency, in other contexts, to prevent the commission of war crimes and curtail the ability of certain powers to conduct military operations. For example, the EU has adopted since 24 February 2022 massive and comprehensive restrictive measures, i.e. international sanctions against the Russian Federation, aiming at curtailing Russia’s ability to wage the war in Ukraine, depriving it of critical technologies and markets and significantly weakening its industrial base. In that context, while EU Member States are primarily responsible for implementing the sanctions, the European Commission “oversees the implementation by Member States and is working closely with them in order to support them on implementation, provide

⁸⁸ ICTR, *Rutaganira*, Trial Chamber Judgment, ICTR-95-1C-T, 14 March 2005, para. 78.

⁸⁹ See e.g. ICTR, *Nyiramasuhuko et al.*, Trial Chamber Judgment, ICTR-98-42-T, 24 June 2011, paras 5896-5899.

⁹⁰ ICTR, *Rutaganira*, Trial Chamber Judgment, ICTR-95-1C-T, 14 March 2005, para. 79.

information to stakeholders, and engage in a dialogue to collect feedback on how sanctions are implemented”.⁹¹

54. To give but one other example, the European Commission is also involved in the functioning of the European Union Agency for Criminal Justice Cooperation (Eurojust),⁹² an EU agency operating the European Network for investigation and prosecution of genocide, crimes against humanity and war crimes (the “Genocide Network”) established in 2002 “to enable close cooperation between the national authorities when investigating and prosecuting the crime of genocide, crimes against humanity and war crimes, known collectively as core international crimes. The Network’s mandate is to ensure perpetrators do not attain impunity within the Member States”.⁹³

(c) The crimes facilitated by the omissions of President von der Leyen would have been substantially less likely had she acted pursuant to her legal duty to act

55. Should President von der Leyen have acted pursuant to her legal duty to act, rather than sought to “ensure freedom of action for Israel in the continuation of the campaign”,⁹⁴ the crimes would have been substantially less likely to occur, or at the very least to be perpetrated over such a long period of time, and on such a scale and magnitude. It is thus submitted that the diplomatic support enjoyed by Israel from President von der Leyen (as well as from many other world leaders), especially the lack of adequate and effective public condemnation of the crimes committed, the lack of practical and effective measures and action intended to ensure the prevention of such crimes and the cessation of the criminal behaviour of IDF troops, has been the condition *sine qua non* of the perpetration of war crimes, crimes against humanity and genocide plausibly committed by the IDF in the Gaza Strip since 7 October 2023.

56. The analysis above has overall demonstrated beyond doubt the existence of the requisite nexus between the rendering of assistance by President von der Leyen and the crimes committed by the IDF in the OPT.

⁹¹ See European Commission, [Sanctions adopted following Russia’s military aggression against Ukraine](#) (accessed on 12 April 2024).

⁹² See Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust).

⁹³ See European Union Agency for Criminal Justice Cooperation, [Genocide Network](#) (accessed on 12 April 2024).

⁹⁴ Ministry of Foreign Affairs of Israel, Press Release, Statement by Prime Minister Benjamin Netanyahu, 7 October 2023.

F. Complementarity

57. The ICC Appeals Chamber in the *Katanga* case established a two-step test for complementarity under Article 17 of the Rome Statute.⁹⁵ The test considers the action or inaction of the relevant State and the motive behind this action or inaction:

1. are there on-going investigations or prosecutions, or have investigations been carried out and a decision made not to prosecute?; and
2. is the State unwilling or unable to carry out investigations or prosecutions to the required standard? This requires the OTP to consider the nature and quality of the proceedings. The OTP is guided by the considerations set out in Article 17(2) and (3) of the ICC Statute.

The absence of national proceedings is sufficient to make the case admissible and the question of unwillingness or inability does not arise.⁹⁶

58. To the knowledge of the authors of the present communication, there are nor have been any national investigations or prosecutions against President von der Leyen in relation to the facts documented in the present communication, neither in Germany – of which von der Leyen is a national – nor in Belgium (where the European Commission is based), nor in any other jurisdiction. This is sufficient to satisfy the complementary test under Article 17.

G. Gravity

59. Article 17(1)(d) of the ICC Statute provides that the Court shall determine that a case is inadmissible, if “the case is not of sufficient gravity to justify further action by the Court”. According to the Office of the Prosecutor of the ICC, the criteria of gravity of a crime can be evaluated through the factors of scale, nature, manner of commission, and impact of the crimes.⁹⁷ It has already been abundantly documented that the current situation in Gaza satisfies all these factors.

⁹⁵ *Katanga* (ICC-01/04-01/07-1497), Judgement on the Appeal of Mr Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 78. The two-step test was also referred to by the Pre-Trial Chamber I in the *Situation in Libya*, (ICC-01/11-01/11), Decision on the Admissibility of the Case against Abdullah Al-Senussi, 11 October 2013, para.26.

⁹⁶ OTP, *Policy Paper on Preliminary Examinations*, November 2013, para.47.

⁹⁷ OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, para. 38.

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Avocats pour la Justice au Proche-Orient, Paris, France

Collectif de Juristes pour le Respect des Engagements Internationaux de la France (CJRF)
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Tim Clennon, independent anti-war activist

Marjorie Cohn, Professor Emeritus of Law at the Thomas Jefferson School of Law

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STOP THE GENOCIDE!

medeplichtigheid' aan de genocide in Gaza

Het Geneva International Peace Research Institute (GIPRI) heeft een verzoek ingediend bij het Internationaal Strafhof (ICC).

Om onderzoek te doen naar de voorzitter van de Europese Commissie, Ursula von der Leyen , wegens medeplichtigheid aan Israëlische oorlogsmisdaden in de Gazastrook.

In een mededeling die op 22 mei door GIPRI is ingediend, wordt “aan de hand van feiten en bewijsmateriaal uiteengezet dat er redelijke gronden zijn om aan te nemen dat de huidige voorzitter van de Europese Commissie ... medeplichtig is aan een aantal schendingen van het internationaal humanitair recht,

Dit komt neer op misdaden binnen de jurisdictie van het ICC, gepleegd door de Israëlische strijdkrachten tegen Palestijnse burgers in het land bezette Palestijnse Gebieden (OPT), inclusief de Gazastrook.”

“Deze mededeling wordt onderschreven door verschillende mensenrechtengroeperingen en vooraanstaande academici en deskundigen op het gebied van de internationale verdragen en mensenrechtenschendingen, roept de aanklager van het ICC op om een onderzoek in te stellen op basis van de informatie die is verstrekt tegen mevrouw Ursula von der Leyen,”

voegt de mededeling eraan toe.

GIPRI merkt op dat Von der Leyen medeplichtig is aan schendingen van de artikelen 6, 7 en 8 van het Statuut van Rome van het ICC, waaronder militaire, economische, diplomatieke en politieke steun aan Israël.

Er wordt aan toegevoegd dat zij “kennis had van deelname, door te helpen en aan te moedigen, bij het plegen van de relevante misdaden” en dat zij “ een belangrijke rol heeft gespeeld bij het veiligstellen van de verstrekking van middelen, in de vorm van militaire steun, aan de IDF.”

Het neemt ook nota van Von der Leyens “onvoorwaardelijke” politieke steun en “aanmoediging en morele steun” aan Israël en zijn leger. “Mevr. Von der Leyen kan zich niet onttrekken aan het simpele feit dat zij op de hoogte was van dergelijke misdaden, of op zijn minst wist van de plausibiliteit ervan. misdaden, zoals bepaald door het Internationaal Gerechtshof in zijn besluit inzake voorlopige maatregelen van 26 januari 2024 met betrekking tot genocide.”

De voorzitter van de EU-commissie is de afgelopen maanden herhaaldelijk bekritiseerd vanwege zijn voortdurende onvoorwaardelijke steun voor Israël, onder meer door de eigen chef van het buitenlands beleid, Josep Borrell heeft oproepen om haar rol in de genocide in Gaza te onderzoeken gelijk nu het ICC wordt geconfronteerd met de dreiging van Amerikaanse sancties voor het aanvragen van arrestatiebevelen tegen de Israëlische premier Benjamin Netanyahu en zijn minister van Defensie Yoav Gallant.

De VS “moeten het ICC straffen en [aanklager van het ICC] Karim Khan terug op zijn plaats zetten”, zei Mike Johnson, Republikeinse voorzitter van de Tweede Kamer. het Amerikaanse Huis van Afgevaardigden, op 23 mei 2024.



TER BESLISSING

Aan
Van
Via
Kopie aan
Afgestemd met

M

Bescherming persoonlijke levenssfeer

Datum
06-02-2024

Onze Referentie
Min-BuZa.2024.462

Opgesteld door

Bescherming persoonlijke levenssfeer

Uiterlijk bij
WEEKENDTAS M van 9 februari

Plandatum/Deadline Kamer
Voor de BZ
begrotingsbehandeling

Binnengekomen op
n.v.t.

nota

Reactie kabinet op Uitspraak IGH inzake Zuid-Afrika v
Israël

Aanleiding

- Uitspraak Internationaal Gerechtshof (IGH) van 29 januari 2024 in de rechtszaak van Zuid-Afrika tegen Israël over vermeende genocide op Palestijnen in de Gazastrook.
- Uw toezegging aan de Kamer tijdens het CD Gymnich d.d. 30 januari jl. om met een reactie te komen naar aanleiding van het verzoek van de Kamer in relatie tot deze uitspraak, voor de behandeling van de begrotingsbehandeling BZ (13 en 14 februari 2024).

Geadviseerd besluit

Uw akkoord met bijgesloten concept-Kamerbrief.

Kernpunten

De concept-Kamerbrief biedt een reactie van het kabinet op het verzoek van de Kamer met betrekking tot de uitspraak van het IGH. Het concept voorziet in een feitelijke weergave van de uitspraak. Daarin worden de volgende elementen benoemd:

- De door het IGH opgelegde voorlopige maatregelen;
- Het voorlopige karakter van de uitspraak;
- De grond voor de uitspraak, namelijk de plausibiliteit van het in het geding zijn van bepaalde rechten onder het Genocideverdrag;
- De verbindendheid van de uitspraak voor de partijen;
- De zorg van het Hof voor de humanitaire crisis in Gaza alsmede het lot van de gegijzelden;
- De volgende stappen in de procedure.

23 432

De situatie in het Midden-Oosten

Nr. 511

BRIEF VAN DE MINISTER VAN BUITENLANDSE ZAKEN

Aan de Voorzitter van de Tweede Kamer der Staten-Generaal

Den Haag, 13 februari 2024

Conform mijn toezegging gedaan tijdens het Commissiedebat Gymnich van 30 januari 2024, stuur ik u hierbij de reactie op uw verzoek met betrekking tot de uitspraak van het Internationaal Gerechtshof (IGH) in de rechtszaak tussen Zuid-Afrika en Israël inzake vermeende schendingen van het Genocideverdrag ten aanzien van Palestijnen in de Gazastrook.

Zuid-Afrika heeft de procedure op 29 december 2023 bij het IGH aangespannen met de indiening van een verzoekschrift. Op 26 januari 2024 heeft het IGH uitspraak gedaan over het verzoek tot het opleggen van voorlopige maatregelen dat ingediend was door Zuid-Afrika.¹ De conclusies van het Hof zijn gebaseerd op een voorlopig oordeel ten aanzien van de eigen bevoegdheid en de ontvankelijkheid van de claims van Zuid-Afrika alsmede de plausibiliteit van de rechten van Zuid-Afrika. Het Hof kan zijn oordeel ten aanzien van deze punten herzien in een volgende fase nadat het de partijen hierover gehoord heeft. Volgens het Hof is het aannemelijk dat er rechten van Zuid-Afrika in het geding zijn in dit geschil, namelijk het recht van Palestijnen om niet onderworpen te worden aan handelingen die zijn verboden in het Genocideverdrag en het recht van Zuid-Afrika om naleving door Israël van de verplichtingen onder het Genocideverdrag te eisen. Om te voorkomen dat het geschil verergerd, en te verzekeren dat het Hof zich hierover kan buigen, heeft het Hof het gerechtvaardigd geacht voorlopige maatregelen op te leggen. Deze uitspraak is dus nog geen oordeel over de inhoud van het verzoekschrift van Zuid-Afrika.

De voorlopige maatregelen die het Hof heeft opgelegd verplichten Israël om (a) alle maatregelen te treffen binnen zijn vermogen om genocide te voorkomen; (b) onmiddellijk zorg te dragen dat zijn eigen militairen geen genocide plegen; (c) alle maatregelen te treffen binnen zijn vermogen om het aanzetten tot genocide te vervolgen en bestraffen; (d) onmiddellijk en

¹ Zie voor de uitspraak: <https://www.icj-cij.org/sites/default/files/case-related/192/192-20240126-ord-01-00-en.pdf>.

effectieve maatregelen te treffen om de levering van urgente basisvoorzieningen en humanitaire hulp mogelijk te maken; (e) effectieve maatregelen te treffen om bewijs met betrekking tot beschuldigingen van genocide veilig te stellen en vernietiging daarvan te voorkomen; en (f) binnen een maand aan het Hof te rapporteren over de genomen maatregelen. Deze rapportage blijft vertrouwelijk totdat het Hof overgaat tot openbaarmaking.

Het Hof spreekt in de uitspraak over voorlopige maatregelen ook zijn ernstige zorgen uit over de humanitaire crisis in Gaza en roept op tot vrijlating van de gegijzelden. Het kabinet draagt de boodschappen van humanitaire hulpverlening, vrijlating van gegijzelden, het voorkomen van burgerslachtoffers en het handelen in overeenstemming met het humanitair oorlogsrecht uit sinds de verschrikkelijke terroristische aanval door Hamas op 7 oktober 2023, en zal dit blijven doen.

De uitspraak is bindend voor de beide partijen in de procedure voor het Hof, te weten Zuid-Afrika en Israël. Nederland respecteert de uitspraak en roept de partijen op de uitspraak na te leven, ook in de bilaterale contacten. De volgende stap in de procedure is de indiening door Zuid-Afrika bij het IGH van een inhoudelijke onderbouwing van het verzoekschrift. Israël kan vervolgens bezwaar maken tegen de bevoegdheid van het Hof en/of de ontvankelijkheid van de claims van Zuid-Afrika. Het Hof zal zich dan eerst over deze bezwaren moeten buigen om te beoordelen of de inhoudelijke behandeling van de claims kan worden voortgezet.

De Minister van Buitenlandse Zaken,
H.G.J. Bruins Slot

Intermediary Foundation of the Universal Declaration of Human Rights

A A N T E K E N E N

Tweede Kamer der Staten-Generaal
De Voorzitter
Drs.MA Martin Bosma
Postbus 20018
2500 EA Den Haag

Betreft: Situatie in Gaza

Mierlo, 27 mei 2024

16 mei 2024, debat Tweede Kamer der Staten-Generaal

We komen niet verder met het freewheelen in de Tweede Kamer kwestie Israel vs Gaza!

Het hoogste hof van de Verenigde Naties ICJ in Den Haag heeft op 24 mei 2024 uitspraak gedaan in een zaak die was aangespannen door Zuid-Afrika. Dat land beschuldigt Israël van genocide in Gaza.

Ik verzoek de Staat der Nederlanden de uitvoerende macht van de Staat Israël het kabinet Netanyahu tot onmiddellijke aftreding en uitschrijven nieuwe verkiezingen. Bij niet onmiddellijk gevolg hieraan geven door het huidige kabinet van de Staat Israël alle banden te verbreken inclusief handelsovereenkomsten. (Meer dan 70% van de Israëli's wil ook dat Netanyahu moet aftreden).

Wanneer de regering van Israel ondubbelzinnig de verplichtingen die volgen uit de internationale verdragen te bespreken de relaties te herstellen.

Nederland is tijdens de NAVO-top in Vilnius (Litouwen) gevraagd om de top in 2025 te organiseren. Tijdens deze internationale bijeenkomst komen ongeveer 45 staatshoofden en regeringsleiders, 45 ministers van Buitenlandse Zaken en 45 ministers van Defensie en ongeveer 6.000 delegatieleden naar Nederland. Daarnaast komen er naar verwachting 2.000 journalisten om verslag te doen. In totaal zullen er ongeveer 8.500 mensen aanwezig zijn.

Burgemeester van Den Haag, Jan van Zanen: "Den Haag, gaststad van de wereld; we zijn verheugd met komst van de NAVO-top naar Den Haag. Dit is een grote verantwoordelijkheid en vooral een enorme eer, waar we als stad en inwoners trots op mogen zijn. Den Haag is als internationale stad van vrede en recht de gaststad bij uitstek voor deze topconferentie."

Ik verzoek daarom de Staat der Nederlanden “Den Haag als Internationale stad van vrede en recht” niet alleen in woorden in toespraken en promotie, maar is daden om te zetten.

Ik verzoek de voorzitter van de Tweede Kamer der Staten-Generaal -met spoed- alle kamerleden en fracties van de politieke partijen over deze brief te informeren.

IFUD of Human Rights

Voorzitter

J.P. van den Wittenboer



Raad Algemene Zaken en Raad Buitenlandse Zaken

MOTIE VAN DE LEDEN VAN NISPEN EN DOBBE

Plenair debat (tweeminutendebat) - Tweeminutendebat Raad Buitenlandse Zaken d.d. 27 mei 2024 (CD 23/5)

(5)

De Kamer,

gehoord de beraadslaging,

constaterende dat de aanklager van het Internationaal Strafhof wil dat arrestatiebevelen worden uitgevaardigd tegen kopstukken van Hamas en de premier en Defensie minister van Israël;

overwegende dat Nederland op allerlei manieren militair samenwerkt met Israël;

verzoekt de regering, als het daadwerkelijk komt tot deze arrestatiebevelen, de militaire samenwerking met Israël op te schorten,

en gaat over tot de orde van de dag.

*Van Nispen
Dobbe*

Fracties	Zetels	Voor/Tegen	Niet deelgenomen
PVV	37	Tegen	
GroenLinks-PvdA	25	Voor	
VVD	24	Tegen	
NSC	20	Tegen	
D66	9	Tegen	
BBB	7	Tegen	
CDA	5	Tegen	
SP	5	Voor	
ChristenUnie	3	Tegen	
DENK	3	Voor	
FVD	3	Tegen	
PvdD	3	Voor	
SGP	3	Tegen	
Volt	2	Voor	
JA21	1		Niet deelgenomen

Motie nr: 2902 (21501-02)

Van Nispen / Dobbe SP

Na stemming **verworpen**

Vergaderjaar 2023–2024

21 501-02

Raad Algemene Zaken en Raad Buitenlandse Zaken

Nr. 2907

MOTIE VAN HET LID VAN BAARLE

Voorgesteld 23 mei 2024

De Kamer,

gehoord de beraadslaging,

verzoekt de regering om Netanyahu op Nederlands grondgebied te laten arresteren indien het arrestatiebevel van het Internationaal Strafhof tegen hem wordt bekraftigd,

en gaat over tot de orde van de dag.

Van Baarle

Stemmingsuitslagen

Verworpen met handopsteken

Voor	75	150
47		

[Detail stemming](#)

Fracties	Zetels	Voor/Tegen	Niet deelgenomen
PVV	37	Tegen	
GroenLinks-PvdA	25	Voor	
VVD	24	Tegen	
NSC	20	Tegen	
D66	9	Voor	
BBB	7	Tegen	
CDA	5	Tegen	
SP	5	Voor	
ChristenUnie	3	Tegen	

[Capture Full Screen](#) CTRL+SHIFT+F

DENK	3	Voor	
FVD	3	Tegen	
PvdD	3	Voor	
SGP	3	Tegen	
Volt	2	Voor	
JA21	1		Niet deelgenomen

Congress of the United States
Washington, DC 20515

May 31, 2024

His Excellency Benjamin Netanyahu
Prime Minister of the State of Israel
Embassy of Israel
3514 International Drive N.W.
Washington, D.C. 20008

Dear Mr. Prime Minister:

Last year, Congress was proud to host Israeli President Isaac Herzog in Washington to celebrate 75 years of friendship and partnership between our two democracies. Less than three months later, the horrific attacks of October 7th shocked the world and forced your nation into a fight for its very existence. We join the State of Israel in your struggle against terror, especially as Hamas continues to hold American and Israeli citizens captive and its leaders jeopardize regional stability.

For this reason, on behalf of the bipartisan leadership of the United States House of Representatives and the United States Senate, we would like to invite you to address a Joint Meeting of Congress.

The existential challenges we face, including the growing partnership between Iran, Russia, and China, threaten the security, peace, and prosperity of our countries and of free people around the world. To build on our enduring relationship and to highlight America's solidarity with Israel, we invite you to share the Israeli government's vision for defending democracy, combatting terror, and establishing a just and lasting peace in the region.

Sincerely,



MIKE JOHNSON
Speaker of the House



CHARLES SCHUMER
Senate Majority Leader



MITCH McCONNELL
Senate Republican Leader



HAKEEM JEFFRIES
House Democratic Leader

WASHINGTON

De Amerikaanse senator Bernie Sanders heeft zaterdag kritiek geuit op congresleiders die ‘oorlogsmisdadigers’ Israëli’s hadden uitgenodigd. Premier Benjamin Netanyahu spreekt een gezamenlijke zitting van het Congres toe.

“Het is een zeer trieste dag voor ons land dat premier Benjamin Netanyahu is uitgenodigd – door leiders van beide partijen – om een gezamenlijke bijeenkomst van het Amerikaanse Congres toe te spreken”, zei Sanders in een verklaring.

“Netanyahu is een oorlogsmisdadiger. Hij mag niet worden uitgenodigd om een gezamenlijke bijeenkomst van het Congres toe te spreken. Dat zal ik zeker doen niet aanwezig zijn”, benadrukte Sanders. Zijn opmerkingen kwamen een dag nadat de leiders van de Amerikaanse Senaat en het Huis van Afgevaardigden Netanyahu vrijdag hadden uitgenodigd om een gezamenlijke zitting van het tweekamercongres toe te spreken.

De brief waarin Netanyahu werd uitgenodigd, werd ondertekend door Mike Johnson, voorzitter van het Republikeinse Huis van de Democratische Senaat Meerderheidsleider Chuck Schumer, de Republikeinse leider van de Senaat Mitch McConnell en de Democratische leider van het Huis van Afgevaardigden Hakeem Jeffries. Sanders, een onafhankelijke partij die samenwerkt met de Democraten in de Senaat, zei dat Israël het recht heeft om zichzelf te verdedigen tegen de Palestijnse groepering Hamas, maar niet het recht heeft om oorlog te voeren tegen de gehele Palestijnse groepering, Palestijnse volk. “Israël heeft niet het recht om meer dan 34.000 burgers te doden en meer dan 80.000 – 5% van de bevolking van Gaza te verwonden. Het heeft niet het recht om 19.000 kinderen wees te laten worden. Het heeft niet het recht om.. Hij benadrukt dat Israël niet het recht heeft om het gezondheidszorgsysteem van Gaza te vernietigen en scholen te bombarderen. Sanders voegde eraan toe: “Het heeft zeker niet het recht om humanitaire hulp te blokkeren – voedsel en medische benodigdheden – die naar de wanhopige bevolking van Gaza komen, waardoor de omstandigheden voor verhongering en hongersnood worden geschapen. “De senator onderstreepte ook dat het Internationaal Strafhof onlangs heeft aangekondigd dat het arrestatiebevelen zoekt voor zowel Netanyahu als Yahya Sinwar , de leider van Hamas.

“Het ICC heeft gelijk. Beide mensen zijn betrokken bij duidelijke en schandalige schendingen van het internationaal recht,” hij voegde toe. Volgens berichten in de lokale media heeft Netanyahu de uitnodiging aanvaard om beide huizen toe te spreken Congres. Hij zal de eerste buitenlandse leider zijn die vier keer voor beide huizen van het Congres zal spreken. Sinds 7 oktober vorig jaar heeft Israël de Gazastrook bestormd als vergelding voor een aanval van Hamas op 7 oktober waarbij ongeveer 1.200 mensen. Meer dan 36.000 Palestijnen zijn in Gaza gedood sinds Israël bijna acht maanden geleden zijn aanval begon. Volgens de lokale gezondheidsautoriteiten zijn de meeste doden vrouwen en kinderen, terwijl ruim 82.000 anderen gewond zijn geraakt. Israël wordt ook beschuldigd van genocide bij het Internationale Gerechtshof, dat in zijn laatste uitspraak Tel Aviv opdroeg zijn operaties in Rafah, waar meer dan 1 miljoen Palestijnen hun toevlucht hadden gezocht voor de oorlog, onmiddellijk stop te zetten.

